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REPORTS OF CASES
DECIDED
IN THE
HIGH COURT OF CHANCERY
OF
MARYLAND.



HON. JOHN JOHNSON, CHANCELLOR.

VOL. IV.

Concluding the Cases from 1846 to the Termination of the Court in 1854.

BALTIMORE:
PUBLISHED BY JAMES WINGATE.
1854.

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P R E F A C E .

THE present volume concludes the series of Reports of the Decisions of the late Chancellor, the HON. JOHN JOHNSON. These four volumes embrace all the more important cases decided in the High Court of Chancery from the 21st of December, 1846, the date of the Chancellor's appointment, to the 10th of March, 1854, the period at which, by the provisions of the Constitution, his office terminated.

The Legislature of Maryland, at its recent session, acknowledged the high merits of this work in renewing the State subscription for one hundred and ninety copies of the fourth volume, by the passage of the following act :

“AN ACT, entitled an Act to complete the Reports of Maryland Chancery Decisions, heretofore purchased by order of the Legislature.

[Passed March 8th, 1854.]

“SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the State Librarian is hereby authorized to purchase one hundred and ninety copies of the fourth volume of the Maryland Chancery Decisions, published by James Wingate, to be distributed by said Librarian as the reports of the Court of Appeals are distributed.

“SEC. 2. *And be it enacted,* That said volume of Maryland Chancery Decisions shall not contain less than six hundred pages, and that the price to the State shall be five dollars per volume.

“SEC. 3. *And be it enacted,* That upon the presentation of the receipt of the State Librarian that said volumes have been delivered to the State

Library, the Comptroller of the Treasury shall issue his warrant to the Treasurer to pay said James Wingate for the said Maryland Chancery Decisions, at the rate of five dollars for each volume purchased.

“SEC. 4. *And be it enacted*, That the sum of nine hundred and fifty dollars is hereby appropriated from the State Treasury for the purchase of the fourth volume of said Maryland Chancery Decisions, to be paid out of any unappropriated money in the State Treasury.

“SEC. 5. *And be it enacted*, That this act shall take effect from and after the date of its passage.”

The same appropriation was made, also by a nearly unanimous vote, for the first and second volumes of the work, at the session of 1852, and for the third volume at the session of 1853. The high appreciation of Chancellor Johnson's abilities by the legal profession, has been manifested by the unexampled sale of the work, the entire edition of sets of the Reports having been long since exhausted.

JAMES WINGATE.

BALTIMORE, *July*, 1854.

A LIST
OF THE
CHANCELLORS OF THE STATE OF MARYLAND.

RICHARD SPRIGG. Appointed by the General Assembly, 3d of April, 1777; resigned, March, 1778.

JOHN ROGERS. Appointed by the Governor and Council, 20th of March, 1778; died, 1789.

ROBERT HANSON HARRISON. Appointed 1st of October, 1789; declined accepting.

ALEXANDER CONTEE HANSON. Appointed 3d of October, 1789; died, 1806.

GABRIEL DUVALL. Appointed 20th of January, 1806; declined accepting.

ROBERT SMITH. Appointed 23d of January, 1806; declined accepting.

WILLIAM KILTY. Appointed 26th of January, 1806; died, 1821.

JOHN JOHNSON. Appointed 15th of October, 1821; died, 1824.

THEODORICK BLAND. Appointed 16th of August, 1824; died, 1846.

JOHN JOHNSON. Appointed 21st of December, 1846. Office expired 10th of March, 1854.

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CASES

IN THE

HIGH COURT OF CHANCERY.

JOHN NICK. WATKINS
vs.
ABRAHAM V. ZANE.

}

DECEMBER TERM, 1847.

[SET-OFF.]

To authorize a set-off, either at law or in equity, the debt must be mutual, and due to and from the same persons in the same capacity.

The complainant cannot set off a claim for professional services rendered the defendant and another *jointly*, or upon their joint employment, against a judgment at law in favor of defendant alone, against complainant and another.

[The bill was filed, to be relieved from the payment of a judgment in favor of A. V. Zane against the complainant, and one Nicholas E. Watkins, upon the allegation that after the same was rendered, the complainant had performed professional services for the defendant, and one William McNeir, the latter's father-in-law, and who, in consideration thereof, had promised complainant that it should be entered satisfied. An injunction was granted, but upon the filing of the answer of Zane, denying the allegations of the bill, it was dissolved, and complainant paid the judgment under a *ca. sa.* Proof was then taken, the nature of which appears from the opinion of the Chancellor.]

THE CHANCELLOR :

This case is now submitted for final hearing, and it being admitted that the amount of the judgment at law, by the defendant against the plaintiff, has been paid, the effort of the complainant is to have the money refunded to him.

The case *as proved*, upon which the complainant relies, is not the case made by his bill. The bill alleges that McNeir, the father-in-law of the defendant, promised that the judgment should be entered "*satisfied*," in consideration of professional services rendered by the complainant for McNeir and the defendant; but the proof is, that the defendant, Zane, promised, or directed, that it should be entered "*settled*." The equity of the bill being denied by the answer, and the proof not supporting the bill, but making a different case, it may well be doubted whether, if there was no other objection, the complainant could obtain relief.

There is, however, another objection. The defendant, Zane, had a judgment at law against the complainant and another, and the complainant has a claim against the defendant and McNeir, for professional services rendered them. The averment of the bill is, that the complainant "had been employed by the said Zane and one William McNeir, the father-in-law of the said Zane, as solicitor in Chancery," &c. He claims then to set off these services to those parties *jointly*, or upon their joint employment of him, against a judgment at law against himself and one Nicholas E. Watkins. This, I think it clear, cannot be done, either in equity or at law, and that in both Courts, to authorize a set-off, the debt must be mutual, and due to and from the same persons in the same capacity. *Dale vs. Cooke*, 4 *Johns. Ch. Rep.*, 11.

The complainant therefore cannot succeed, and his bill must be dismissed; but, under the circumstances of the case, I think it would be harsh to subject him to costs, and I shall make each party pay his own costs.

J. N. WATKINS, for Complainant.

N. HAMMOND, for Defendant.

HENRY P. BROOKS, PERMANENT TRUSTEE	}	DECEMBER TERM, 1852.
OF HENRY P. THOMAS,		
vs.		
HENRY P. THOMAS AND JOHN H. T. JEROME.		

[INSOLVENT LAWS—EFFECT OF ANSWER.]

WHERE the trustee attempts to vacate an assignment of the insolvent, as in violation of the insolvent system, he is not required to offer direct evidence of the facts upon which he relies, but may avail himself of circumstances to establish the intent with which the assignment was made, and if they be sufficiently strong, it will be set aside.

But where the answer or evidence of the insolvent denies such intent, the difficulty of making it out is materially increased, and nothing short of circumstances of the strongest description will justify the Court in disregarding such answer or evidence.

There must be both the intent to prefer, and to take the benefit of the insolvent laws, or the transfer will not be disturbed.

To avoid a transfer or payment, under the 1st section of the Act of 1834, ch. 293, *actual notice* must be brought home to the preferred creditor of the insolvency of the debtor; mere technical or constructive notice is not sufficient.

[The facts of this case are stated in the opinion.]

THE CHANCELLOR:

By the bill in this case, which was filed on the 15th of October, 1850, it appears that the defendant, Thomas, petitioned for the benefit of the insolvent laws on the 5th of February, 1849, and that the complainant was appointed and qualified by giving bond as his permanent trustee in September, 1850.

The proceedings show that Thomas, the insolvent, and one Spotswood Childress, commenced business as grocers in the city of Baltimore in September, 1847, and continued to carry it on until March, 1848, when they dissolved, and Childress retired, and took with him the capital which he put in, about \$600, and his share of a small estimated amount of profit. No capital was furnished by Thomas, but he brought

into the concern about \$600 worth of groceries, which had been purchased on credit from the defendant, Jerome, who charged them to the firm. Thomas continued to carry on the business by himself until some time in September or early in October, 1848, when he failed, being at the time utterly insolvent. Very soon after this, that is to say, on or about the 7th of October of that year, Thomas proposed to a portion or all of his creditors, to make a general assignment for their common and equal benefit, of all his assets, provided they would release him from responsibility. This the defendant, Jerome, agreed to do, but some or all the other creditors refusing, the assignment was not made, and the arrangement abandoned. Mr. Jerome, in his answer, states that the proposition by Thomas to him was made about September, 1848, he being at that time a creditor to the amount of \$2,130, but the proof of Randall shows that the proposition to Bansemer, a creditor, was made about the 7th of October, 1848. Upon the abandonment of this proposition, and in a few days after the last-mentioned date, Thomas made sale of his entire stock of goods, and having paid a note for \$187 25, which was endorsed by Jerome, and discounted at the Western Bank of Baltimore, he paid over to Jerome the whole residue of the proceeds of the sales, amounting, with other moneys, to \$990 in cash, and transferred to him notes and furniture (the latter worth about \$75) amounting to \$1,010. I am quite satisfied from the proof that the money, moneyed securities, and property paid, assigned, and delivered by Thomas to Jerome, constituted, with a very inconsiderable exception, everything he possessed. In fact, it may perhaps be safely stated, that he reserved nothing which, under our insolvent laws, he could be required to surrender for the benefit of his creditors, and, in fact, when he petitioned on the 5th of February, 1849, he returned no assets of any description whatever.

The bill assails the preference given to Mr. Jerome upon two grounds: 1st, that it was given with a view and under an expectation on the part of Thomas, of taking the benefit of the insolvent laws, and with intent thereby to give an undue

and improper preference to this favored creditor; and 2d, that the payment, assignment, and delivery was made after Thomas was insolvent, and when Jerome knew of his insolvency, and when the former could have had no reasonable expectation of being able to relieve himself from his liabilities otherwise than by applying for the benefit of the insolvent laws, in other words, that the case comes within the provisions of the Act of 1834, ch. 293, and the preference condemned by that Act.

It is, of course, quite unnecessary to repeat what has been so often said, that a trustee of an insolvent debtor attempting to vacate an assignment as made in violation of the insolvent system, is not required to offer direct evidence of the facts upon which he relies, but he may avail himself of facts and circumstances to establish the intention with which the assignment was made, and if they be sufficiently strong, the assignment will be set aside. Such was the opinion of the Court of Appeals in *Dulany vs. Hoffman*, 7 G. & J., 170, and the proposition is not to be questioned. *Glenn vs. Baker*, 1 Md. Ch. Decisions, 73; *Powles vs. Dilley*, 2 *Ibid.*, 119.

But though the plaintiff, in cases like the present, is not required to produce direct evidence that the insolvent, at the time of the assignment, intended to apply for the benefit of the insolvent laws, but may rely upon facts and circumstances to establish the intent, it is most manifest that the difficulty of making out the intent is materially increased when the insolvent, either by his answer, if he be made a defendant, or by his evidence, if he be examined as a witness, denies such intent, and I am aware of no case where the intent has been established in opposition to such answer or evidence. The motives which may influence a party at the time of doing an act, are generally so exclusively within his own knowledge, that it is extremely difficult to attribute to him one different from that which he avows. Indeed, if the avowal be made under the obligation of an oath, as he cannot be mistaken upon such a subject, the imputation of a contrary intention carries with it the imputation of wilful and deliberate perjury. In *Hickley vs. The Farmers and Merchants' Bank*, 5 G. & J.,

377, in which the complainant examined the insolvent as a witness, who testified that he did not confess the judgment complained of with a view or under an expectation or intention to take the benefit of the insolvent laws, the Court of Appeals not only refused to grant the relief prayed by the bill, but stopped the counsel who was to have argued for the appellee, the preferred creditor. And in *Dulany vs. Hoffman*, 7 G. & J., 170, it may perhaps be fairly inferred that, notwithstanding the very strong circumstances of that case, to demonstrate the intention to take the benefit of the insolvent laws, and to give the improper preference, the plaintiff would have failed if the answer of the insolvent had expressly denied the allegation of the bill charging such intention. The language of the Court at page 178, after quoting the allegation of the bill in reference to the intention, is "which is not denied by Hoffman, Beard and Co. in their answer, and Stinchcomb and Small (the insolvents), in their answer, which is responsive to every other part of the bill, pass by altogether that allegation, which leaves the impression that it was not answered, because it could not with truth be denied." "The allegation, it is true, is not evidence, but in the absence of all denial, we think it is sufficiently sustained by the facts and circumstances in the cause, made the more strong by the circumstance that Stinchcomb and Small, avoiding all notice in their answer of that allegation, expressly deny the immediately following allegation in the bill, that Hoffman, Beard and Co. colluded with them to gain an undue preference."

Although, therefore, the answer or testimony of the insolvent, if he is examined as a witness, may be overcome, even with regard to his intent in giving one creditor a preference over others, by facts and circumstances, still the attempt to do so is surrounded by impediments of the most formidable character, and nothing short of circumstances of the strongest description will justify the Court in disregarding the answer or deposition of the insolvent. It is not sufficient that an intent to give the favored creditor an undue preference is shown. It must also be shown that at the time the transfer

was made, the party making it intended to take the benefit of the insolvent laws. Both intents must be found to exist, or the transfer will not be disturbed. The cases decided upon the Acts of 1812, ch. 77, and 1816, ch. 221, all concur in this, and the question, therefore, in this case is, whether at the time the transfer was made to Jerome, Thomas, the insolvent, intended not only to prefer him over his other creditors, but to apply for the benefit of the insolvent laws?

The bill charges both intents, and the answer of Thomas, in the most direct and unequivocal terms, denies the allegation that he made the transfer and payment to Jerome with a view and under an expectation of being and becoming an insolvent debtor. This denial is repeated more than once, and is couched in terms as express as our language will afford. Are the facts and circumstances of the case powerful enough to overthrow it? If they are, the answer must give way to them, though the alternative is the conclusion that the respondent has deliberately denied on oath a statement which he knew to be true.

It is not enough to say that Thomas, the insolvent, at the time he made the transfer, could have had no reasonable expectation of being exempted from liability or execution for or on account of his debts, and without applying for the benefit of the insolvent laws. The absence of grounds for such reasonable expectation might bring the case within the 1st section of the Act of 1834, ch. 293, and vacate a preference made to a creditor having notice of the insolvent condition of the debtor. We have nothing to do, so far as this part of the case is concerned, with the reasonableness or unreasonableness of the expectation of the debtor. His expectation that his creditors would forbear with him, may be wholly absurd. The circumstances may be such that most men would look to a resort to the insolvent laws for relief, as the only probable alternative left them. But, nevertheless, if the insolvent himself making the transfer, did not make it with intent to take the benefit of the insolvent laws, and also to give an undue and improper preference to the favored creditor, the transfer will stand,

being no more than the exercise of his common law right to secure one creditor to the exclusion of others.

It has already been stated that some short time before the transfers were made to Jerome, Thomas had proposed to his creditors to make an assignment for their common and equal benefit, provided they would release him, and that they or some of them refusing, he transferred to Jerome. But he says in his answer that he did not expect to be compelled to petition, as his debts, exclusive of that due Jerome, were so small, he did not think his creditors would force him to take the benefit of the insolvent laws, but he believed they would give him time, and save him from that necessity. This may have been an unreasonable expectation on the part of Thomas, but is it so improbable and unnatural as to justify the Court in concluding that he did not entertain it, though, under the solemn sanction of an oath, he says he did. His debts, exclusive of that due Mr. Jerome, did not exceed \$600, and it may be in view of his relations between them, which appear to have been of the most friendly character, that he looked to Mr. Jerome to put him in a way to satisfy them. It would be vain to attempt to deny that there are strong circumstances of suspicion in this case, and but for the explicit denial of the answer of Thomas upon the point of intention, I should have concluded, from all the circumstances, that he intended to do that which seems to me would necessarily follow from his conduct. It was unquestionably calculated to incense his creditors, and he might well have supposed that they would resort to coercive measures against him, and that in that event the insolvent laws were his only refuge from imprisonment. But he swears otherwise, and I do not find in the facts and circumstances, those strong and controlling considerations which should overthrow what a party says upon oath in regard to his own intentions.

The next inquiry is, whether the transfer was made under circumstances which bring it within the provisions of the first section of the Act of 1834, ch. 293? And with regard to this question, I should answer it at once in the affirmative, and de-

creed relief accordingly, but for the proviso to the section, which makes it inapplicable to the case of a creditor "who shall appear not to have had notice of the condition of insolvency of the debtor." This Act, in its first section, was, it is presumed, designed to alter the previous laws upon the subject to which it relates in *three* particulars. First, it was intended to embrace and render void *payments eo nomine*, made by an insolvent debtor to his creditor, under the circumstances mentioned in the Act, which payments, according to the decision of the Court of Appeals, in *Stewart, trustee, vs. The Union Bank, 7 Gill, 439*, were not comprehended in the earlier legislation. Second, to reach and invalidate preferences given to favored creditors, upon the request or solicitation of the latter, which, in the judgment of the same Court, were not within the anterior laws. See the case of *Crawford & Sellman vs. Taylor, 6 G. & J., 323*. And third, not to require as indispensable to avoid the preference, that it should be made with a view, or under an expectation of taking the benefit of the insolvent law, but to substitute therefor the absence of a reasonable expectation of being exempted from liability, or execution for or on account of his debts, without applying for the benefit of the insolvent laws.

Now I should certainly say, that the defendant, Thomas, could, in this case, have had no reasonable expectation when he made the transfer to his co-defendant, of exemption from liability, or execution for or on account of his debts, but by a resort to the insolvent laws. His conduct in making that transfer was unquestionably calculated to exasperate his other creditors; and as by it he divested himself of all means of paying them, he could not reasonably rely upon their forbearance. He says in his answer, to be sure, "that as the amount he owed, exclusive of his debt to Jerome, was small, he did not think his creditors would force him to take the benefit of the insolvent laws, but he believed they would give him time and save him from that necessity." But this, I think, was an unreasonable expectation, and I should not hesitate to condemn the transfer, if I were convinced that Mr. Jerome had notice

at the time of the insolvent condition of Thomas. It is to be observed, that actual notice must be brought home to Jerome, derived from a knowledge of the condition of Thomas, and not a mere technical or constructive notice. This is the construction put by the Court of Appeals upon the Act of Assembly in question, in the case of *Cole vs. Albers & Runge*, 1 Gill, 412, and of course this Court, if disposed so to do, is not at liberty to construe it differently.

The bill here charges that the transfer to Jerome was made after Thomas was insolvent, and after Jerome was aware of his insolvency; and one of the special interrogatories is framed with a view to extract from him his knowledge in regard to the condition of the affairs of Thomas at the time of the proposition to assign for the benefit of all the creditors, or before or afterwards. The answer of Jerome admits that Thomas, about September, 1848, called on him, and made the proposition referred to, which he assented to, Thomas then assuring him that he was able to pay all his creditors in full, and that the respondent did not know or believe that Thomas was insolvent, or unable to pay his debts. Again, "respondent admits that Thomas failed in his business, but expressly denies that at the time he received the money and effects from said Thomas, as above stated, that he knew or believed that he was insolvent, or contemplated applying for the benefit of the insolvent laws;" and this denial is afterwards repeated, in a subsequent part of the answer, in terms equally explicit.

Now notwithstanding the ingenious and plausible views which have been pressed upon me by the counsel for the complainant, I cannot bring myself to believe that the defendant, Mr. Jerome, did know what upon the solemn sanction of an oath he says he did not know. If, to be sure, there was evidence in opposition to the answer, which, according to the well-settled rule of this Court, would be sufficient to discredit it, it would have to give way to the evidence, and a decree against him would pass accordingly. But I do not find in the record that description of proof. In the language of the Court of Appeals, in *Cole vs. Albers & Runge*, "we have no

evidence that inquiries had been made into the extent of the assets of the assignors, or the extent of their liabilities, by inquiring into which alone could any judgment have been formed, or notice be attributed." Nor is there any other proof in this case bringing home to Jerome a knowledge of the insolvent condition of Thomas, sufficiently pregnant to overcome his direct and emphatic denial of such knowledge in his answer.

I am therefore of opinion, that the complainant is not entitled to relief, but there is quite enough in the cause to protect him against a decree for costs, and accordingly, in dismissing his bill, the parties respectively will be required to pay their own costs.

HENRY P. BROOKS and LEVIN GALE, for Complainants.
C. H. PITTS, for Respondents.

[An appeal was taken by the complainants, which is still pending.]

SAMUEL HOPKINS,	}	MARCH TERM, 1851.
vs.		
HENRY McELDERY.		

[MOTION TO BRING MONEY INTO COURT.]

Those who make the motion to have money brought into Court, must show that they have an interest in the sum proposed to be called in, and that he who holds it in his possession, has no equitable right to it whatever, and the facts on which these positions are based must be found in the case as it then stands, either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings.

An answer exhibited accounts, showing a balance due complainant, which defendant says he was willing to settle, but the former refused to receive, and filed his bill, and the defendant believed, and still believes, that balance to be too large, and insists that he is now entitled to have certain sums credited with which he had not been credited in the accounts. HELD —That these admissions were not sufficient to authorize an order to bring the balance into Court.

[The facts of the case are stated in the opinion.]

THE CHANCELLOR :

This case is submitted, on the part of the defendant, upon the petition of the complainant and the order of the Court of the 12th of March last, requiring the defendant to bring in a certain sum of money, or show cause to the contrary by a day limited for that purpose.

✓ The case is submitted without proof, and therefore the propriety of compelling the defendant to bring in the money depends entirely upon the admissions of the answer; and upon these admissions indeed the complainant rests his application. The rule upon this subject is well stated, by the late Chancellor, in *McKim vs. Thompson*, 1 *Bland*, 150. At page 159, he says "that those who make this motion" (that is, a motion to have money brought in), "must show that they have an interest in the sum of money proposed to be called in, and that he who holds it in possession has no equitable right or title to it whatever; and the facts on which these positions are to be based, must be found in the case as it then stands. Either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings."

✓ Now in this case the answer exhibits certain accounts, showing a balance due the complainant, upon which the defendant says he was willing to settle and pay the balance; but that complainant had refused to receive such balance, and subsequently filed his bill in this Court. But this exhibition of the accounts and declared willingness to pay the balance appearing by them to be due the complainant, is accompanied by the qualification "that the respondent believed, and still believes, that the balance there struck in favor of the complainant, was too large." And in a subsequent part of the answer, the defendant, after alleging that he had paid certain sums with which he had not been credited, claims that he is now entitled to have them credited in his settlement with the complainant.

The admission, therefore, perhaps, can be regarded as nothing more than an offer to compromise a disputed account,

which offer not being accepted, cannot be used with much effect in the progress of the cause: that, at all events, it is certainly not now in the power of the Court to say that the fact that the defendant owes this precise sum, is so conclusively established as to be open to no further controversy at any subsequent stage of the cause. The application must be overruled.

TEACKLE and BARROL, for the Complainant.

ALEXANDER and GILL, for the Defendants.

JOHN WATSON AND OTHERS	}	DECEMBER TERM, 1851.
vs.		
GEORGE W. GODWIN AND OTHERS.		

[SALE OF LANDS UNDER ACT OF 1785, CH. 72, SEC. 12.]

It must appear to the Chancellor that *all* the parties interested will be benefited by selling the property, before a decree for a sale can be passed under the Act of 1785, ch. 72, sec. 12.

The jurisdiction of the Court cannot be sustained, unless the bill alleges that it will be for the interest and advantage of all parties interested that the land should be sold.

Making the infants complainants, does not dispense with the necessity of proof in support of the allegation that it will be for their interest to have the land sold.

Neither the answer of the infant, nor the answer of adult defendants confessing the fact, is evidence to affect the infant.

A bill for a sale under this Act may, consistently with the practice of the Court, be converted by amendment into a bill for a partition.

[The original bill in this case was filed by George Watson and wife, on the 20th of June, 1849, for a sale of certain lands devised to the wife of the complainant George, and her sister Ann, the wife of the defendant Godwin, as tenants in common in equal shares. The answer of Godwin and wife denies that the sale would be advantageous to those entitled, and objects thereto.

After the commission was issued to take testimony, the wife

of the complainant George, died, and he thereupon in his own right, and as the next friend of his infant children, filed a bill of revivor and supplement, in which it is again charged that it would be for the interest and advantage of all parties interested that the land should be sold, and which allegation is again denied by the answer of Godwin and wife. The nature of the proof taken, appears from the opinion of the Chancellor.]

THE CHANCELLOR:

This bill, as has been correctly observed, is founded upon the provisions of the 12th section of the Act of 1785, ch. 72, which authorizes the Chancellor to direct lands, tenements, &c., to be sold, in which infants, &c., have a joint interest, or interest in common with any other person or persons, when it shall appear, upon hearing and examination of all the circumstances, that it will be for the interest and advantage both of the infant, &c., and of the other person or persons concerned, that a sale should be made. It is not sufficient that one or any number of the parties less than the whole, would be benefited by the sale, but it must appear to the Chancellor that all will be benefited by selling the property. And, as will be seen upon reference to the case of *Tomlinson vs. McKaig*, 5 *Gill*, 256, 274, the jurisdiction of the Court cannot be sustained, unless the bill alleges that it will be for the interest and advantage of all parties interested, that the land should be sold.

The bill in this case contains the necessary allegations, and although by the supplemental bill, the infants appear as parties complainant, and by their next friend concur with the adult party in making the amendment, that does not at all dispense with the necessity of proof in support of it, as has been several times decided by this Court. If the infants had been made defendants, and by their answer by their guardian had admitted the facts alleged in the bill, still there would be no decree against them, but upon proof of all the material allegations. *Kent and Boyle vs. Taneyhill*, 6 *G. & J.*, 1.

In a case involving the very question raised in this, the Court of Appeals decided that the Chancellor was not authorized to decree a sale of an infant's interest in land under this Act of Assembly, on the ground that it would be for his benefit, unless upon proof of that fact, of which neither the infant's answer, nor the answer of the adult defendants confessing the fact, is evidence to affect the infant. *Harris vs. Harris*, 6 G. & J., 111.

This being so, it must be evident that making the infants complainants, ought not to be permitted to obviate the necessity for proof, for if a practice of this sort were to prevail, the rule, as established by the Court of Appeals of not decreeing against infants, except upon proof, could in most cases be evaded. I take it, therefore, in this case, that no decree can be passed for the sale of the property in the proceedings mentioned, unless the proof shall make it apparent that it will be for the interest and advantage of all parties concerned.

The answer distinctly denies the allegation of the bill in that respect, and upon carefully reading the evidence, which is very contradictory, I do not feel myself warranted in saying that the allegation is sustained.

The counsel, in their written arguments, have presented and ingeniously urged many theories in support of the wishes and interests of their respective clients, but in a case like the present, when the only question is, whether the Court shall sell the real estate and convert it into money, and when the law giving the power to do this, declares in terms, that the party asking for its exercise shall satisfy the Court that the interests and advantages of all parties concerned will be promoted thereby, the duty of the Chancellor is confined within narrow limits. If the advantage of a sale is not made apparent by the proof, the Court ought not to order the sale, and especially it should be reluctant to exercise the power in a doubtful case, when some of the parties entitled to the property are opposed to it. As the case comes before the Court upon the bill of review and supplement, the only party applying for the sale, at least, the only party who can be properly regarded as stand-

ing in the attitude of a complainant, is John Watson, who has only a curtesy interest in that portion of the estate which belonged to his late wife, Sarah E. Watson, as his infant children, though made complainants upon the record, are no more committed to the statements of the bill, than if they had been made defendants. And it is therefore substantially a case in which he stands opposed to the parties owning one moiety of the property in fee, and in which those who own the fee in the other moiety are neutral. Under such circumstances, it seems to me the duty of the Court, to require of the complainant very strong proof in support of his case. He having but a life estate in a portion of the property, is asking that the inheritance of the other parties may be sold, that he may receive the value of his interest in money, and they resist the application, being unwilling, and denying the necessity of any such proceeding. In my judgment, the proof in the case falls short of the requirements of such a case, and a decree for a sale cannot be passed.

But though a sale will not be ordered, I do not deem it proper to dismiss the bill, as urged by the defendants' counsel, because by an amendment it may consistently, with the practice of the Court, be converted into a bill for a partition. And I shall therefore pass an order, directing the case to stand over, with leave to the complainants to apply for permission to amend.

CARMICHAEL and BROWN, for Complainants.

CLINTON COOK, for Defendants.

GEORGE SMITH, EXC'R OF
JOHN HOYE
VS.
NELSON BAKER.
AND
CHARLES OLIVER
VS.
THOMAS PERRY.

LAND OFFICE, 19TH OF MARCH, 1851.

[PRACTICE IN THE LAND OFFICE.]

As a general rule, no patent will issue for any land for which a patent has been previously granted so long as such patent remains in force, and exceptions to this rule should be admitted with much caution.

Escheat land must be taken up by a warrant of escheat, and if under such a warrant it is included as vacancy the title does not pass to the patentee but remains in the state.

Where a party takes up escheatable lands as vacancy, and obtains a patent therefor, the title does not pass, and such lands are liable to be granted under an escheat warrant, notwithstanding the pre-existing patent.

[Certificates upon certain escheat warrants were caveated in these cases upon the ground that certain lots included in them had previously been granted to the caveators, and which they had taken up as vacancy. These *caveats* were resisted upon the ground that the title to such lots never passed to the caveators by their patents, but still remained in the state, and were, therefore, liable to be taken up by the caveatees under their escheat warrants. Upon this question, the Chancellor delivered the following opinion :

THE CHANCELLOR :

It is unquestionably a general and well established rule of the land office, that no patent shall be issued for any land for which a patent had been previously granted, so long as such patent remains in force ; and it is equally undeniable that exceptions to this general rule should be admitted with much caution. But notwithstanding this is the acknowledged principle, I feel constrained, in deference to the decision of the Court of Appeals in the case of *Lee vs. Hoye*, 1 *Gill*, 188, to consider these cases either as exceptions to the rule, or as not

embraced within it, and consequently not subject to its operation.

In that case it was decided that land which had been granted by the state could not be taken up and included in a patent as vacancy; that if it had become escheatable, it must be taken up by a warrant of escheat, and if under such a warrant it was included as vacancy, the title did not pass to the patentee, but remained in the state. Such being the case, it follows that the lots included in the grants to the caveators, which lots had been previously granted, and which, it is supposed, had become escheat, but which, nevertheless, they took up as vacancy, were improperly included, and the title did not pass. It remained in the state, and liable to be granted under an escheat warrant, the pre-existing patent to the contrary notwithstanding. It is no answer to say, that in these cases the state received as much or more for composition, treating the land as vacant, as if two-thirds of the value had been paid, as is required when land liable to escheat is taken up; because if such an inquiry must be instituted, and the legality of the proceedings in each case is made to depend upon the value of the land, the distinction between escheat and other warrants would be broken up, and the question would always turn upon the amount paid the state. The principle is understood to be this, that the state having once granted the land, will not grant it a second time, unless the title has reverted to her by escheat. It can, under such circumstances, no longer be regarded as vacant in the sense in which that term is understood in the land office.

The argument of the counsel for the caveators, that as they hold grants issued to them by the state, it is, so far as they are concerned, of no importance by what title the state held, cannot avail them. It rests upon the idea that these grants passed to them the title of the grantor, however that title may have been acquired, whether by the failure of the heirs of the former owner, or because the property never had been granted, and was consequently vacant. The fallacy of the argument is in supposing the title did pass, when, according to the judgment of the Court of Appeals, in *Lee vs. Hoye*, it did not pass, but

remained in the state, subject to be disposed of in the mode in which lands liable to escheat may be disposed of according to the law and rules of the land office.

Submitting, therefore, to the judgment of the Court of Appeals, as all inferior tribunals are bound to do, I consider it my duty to overrule these *caveats*. It is, thereupon, adjudged and ordered that the *caveats* in these cases be, and the same are hereby dismissed, but that each party pay his own costs.

JNO. M. BREWER, for the Caveators.

THOS. PERRY, for the Caveatees.

ARCHIBALD CHISHOLM

vs.

THOMAS PERRY.

GEORGE SMITH

vs.

NELSON BAKER.

LAND OFFICE, 29th OF JULY, 1851.

[PRACTICE IN THE LAND OFFICE—EVIDENCE.]

THERE is no rule of the land office which requires that a *caveat* shall be dismissed because the caveator did not show an interest in the matter in dispute. The judge may on *caveat* or on application for a patent, where there is no *caveat*, refuse a patent on account of a violation of the rules of the said office. Plats authenticated by the signature of the county surveyor, and returned under the orders of the court, must be treated as evidence and have weight accordingly.

[The facts of these cases are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR :

There being no dispute about the law of the land office applicable to these cases, the only question is, whether the caveatees, by competent evidence, have established the fact that these certificates include distinct parcels of land not contiguous to each other. If they have succeeded in doing this, it follows, of course, that the *caveats* must be ruled good.

It is, to be sure, said, in the argument of the counsel for

Nelson Baker, that the caveator of his certificate has no title to, or interest in, the land in controversy, and, upon this ground, it is supposed, the caveat must be overruled. But, upon referring to the *Landholders' Assistant*, page 491, it will be found that there is no rule requiring that a *caveat* shall be dismissed because the caveator did not show an interest in the matter in dispute. The author of that work repudiates any such rule, on a full review of the practice, and says, "that the judge may, on *caveat*, or on an application for a patent, where there is no *caveat*, refuse a patent on account of a violation of the rules of the office." This objection, therefore, cannot be maintained.

But, it is again urged, that no surveys have been made in these cases, showing the want of contiguity in the several parcels of land embraced in these certificates. Plats have, however, been filed, authenticated by the signature of the county surveyor, the same person who made the surveys and certificates of the lands for which patents are asked, by which it does appear that distinct and separate parcels of land, which are not contiguous, have been included in the surveys made by the caveatees.

These plats have been returned, under the orders of the court, and they must be treated as evidence, and, have weight accordingly, and as they show that the rule of the land office has been disregarded, the *caveats* must be ruled good.

But though no patents can issue upon these certificates, as they now stand, an order may be passed for correcting them, so as to exclude the lots which are not contiguous.

It is, thereupon, adjudged and ordered that the aforesaid *caveats* be, and the same are, hereby ruled good, and that the certificate of "*Dalmatia*," and the certificate of "*Monponsett*," be corrected, by excluding such parcels of land in each as may not be contiguous, and that the surveyor of Alleghany county make the said correction, and return the corrected certificates, together with the originals, to this office.

THOS. PERRY, for the Caveators.

J. DEVECMAN, for the Caveatee.

CATHARINE FARINGER, PERMANENT TRUSTEE OF JACOB FARINGER, vs. ELIZA RAMSAY AND WILLIAM EHRMAN. — SAME vs. ELIZA RAMSAY.	}	MARCH TERM, 1850.
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[RESULTING TRUSTS—FRAUDULENT CONVEYANCES—INSOLVENT LAWS.]

A TRUST which results to the party who pays the consideration money for lands, is expressly exempted from the operation of the statute of frauds, and the fact of payment may be established by parol proof.

But though the fact of payment may be shown by parol proof, the evidence must be so strong as to leave no reasonable doubt upon the subject, because of the danger of this description of proof, not only as tending to perjury, but on account of the insecurity to which its introduction exposes the paper title.

Where a party seeks to avoid deeds as fraudulent under our insolvent system he must allege in his bill and prove, that the grantor was indebted at the time of the execution of the conveyances sought to be vacated, and that the deeds were made or caused to be made by him with a view or expectation of taking the benefit of the insolvent laws.

Where a party seeks to avoid deeds as fraudulent under the statute of Elizabeth, he must also allege and prove the existence of creditors at the date of the conveyances, or that the grantor contracted debts subsequently, in respect of which the deeds would be regarded as fraudulent.

[These cases originated in the equity side of Baltimore County Court. The bill in the first case was filed on the 3d of July, 1849, and alleges that Jacob Faringer, sometime in the year 1849, applied for the benefit of the insolvent laws, and that on the 11th of June, 1849, the complainant was appointed his permanent trustee, the said Jacob having in the mean time departed this life. That the complainant was lawfully married to said Jacob in the year 1829, by whom she had six children, five of whom are now living, and have been supported by the complainant since the 20th of June, 1841, when the said Jacob, without fault on her part, left her and went to live with one

Eliza Ramsay, with whom he continued to live until the time of his death. The bill then charges that said Jacob was a thriving, money-making and saving man, who rapidly accumulated means which he invested from time to time with a view to securing for himself the advantage of it during his life, and disposing of it for the benefit of the said Eliza Ramsay after his death, and to deprive the complainant and her children by him, of all benefit of it in his life, and after his death. That so contriving and intending, on the 5th of February, 1847, he purchased a house and lot situated on Lombard street, near Canal street, in the city of Baltimore, and had the same conveyed to said Ramsay by a deed, from Daniel J. Hoppoldt and Samuel Kramer, the owners and vendors thereof, dated the 5th February, 1847. The complainant expressly charges that the purchase money was furnished by said Jacob and that the deed was made to said Ramsay for the fraudulent purpose of enabling said Jacob to enjoy the property during his life, and to leave it after his death to said Ramsay, disencumbered of the interest of complainant therein as his widow, and for the further fraudulent purpose of rendering the same free from the claims of his creditors, and of the complainant for a support. Wherefore, the bill charges, that said contrivance was fraudulent, and that in equity the complainant as permanent trustee of said Jacob is entitled to have said property brought into the assets of the estate of the said Jacob to be distributed according to law. The bill further charges, that the said Ramsay, on the 2d of July, 1849, offered the property for sale on the premises. That the complainant, by her agent, appeared and gave notice to the purchasers that she, as trustee as aforesaid, claimed this property and would assert her right thereto in the proper tribunals. That one William Ehrman agreed to become the purchaser thereof, on the assurance of the auctioneer that he would not be required to pay any of the purchase money until his title thereto was clearly established and free from all incumbrance and claim on the part of the complainant. The bill then prays that the said property may be decreed to be a part of the estate of the said Jacob, to be administered according to law, and for further relief.

The answer of Eliza Ramsay, the defendant, was filed on the 31st of August, 1849, and after admitting the insolvency of Faringer, and the appointment of the complainant as his permanent trustee, expressly denies that the property mentioned in the bill was purchased by said Jacob, and as positively avers that the said property was purchased for this respondent, and paid for by her with her own money, and that said Jacob never had actually or constructively, legally or equitably any right, title or claim to the same.

The bill in the second case contains similar charges and averments in reference to a certain house and lot on the corner of Lombard and Canal streets in said city, which was conveyed to said Eliza Ramsay by one William E. Beale, by deed dated the 7th of April, 1845, for the price of \$800. To this bill also an answer similar in every respect to the preceding one was filed by the said Eliza Ramsay. The answer of Ehrman admits that he became the purchaser of the property as charged in the bill, and prays that he may be dismissed, &c.

The proof taken under the commission is of a conflicting character, and is sufficiently stated in the opinion for an understanding of the points therein decided. The causes were removed to this court, and after argument of counsel, the following opinion was delivered.]

THE CHANCELLOR:

These bills are filed by the complainant, as the permanent trustee in insolvency of Jacob Faringer, her former husband, but now deceased, and seek to set aside the deeds therein mentioned, not as frauds upon her marital rights, but upon the ground that they were made in prejudice of the rights of creditors. The allegations to be sure, are not entirely free from ambiguity. It being in one place alleged, that one of the objects of the conveyances was "to deprive the complainant, and her children by the said Jacob, of all benefit in it, in his life, and after his death." And in another place, that the deeds were made "to the said Eliza Ramsay for the fraudulent purpose of enjoying the property during his life, and leaving it to

the said Eliza Ramsay after his death, disencumbered of the interest of the complainant therein, as the widow of said Jacob, and for the further fraudulent purpose of rendering the same free from the claims of his creditors, and of the complainant for a support." Wherefore (the bill charges) that the said contrivance was fraudulent, and that in equity, she (the complainant) as the permanent trustee of the said Jacob, is entitled to have said property brought into the assets of the estate of the said Jacob, to be distributed according to law." The bills, however, are filed by the complainant in her character of permanent trustee of Jacob Faringer, and not as his widow claiming her share of his personal estate, and the question, therefore, is, whether in the former capacity she is entitled to have the conveyances avoided and the property turned over to her to be administered in insolvency?

These cases, then, in this view of the claim made by the bills, which upon the argument I understood to be the view taken by the plaintiff's solicitor, renders inapplicable to the questions now to be decided, the principles settled by this court in *Hays vs. Hays*, decided in February, 1849, because in that case the deed was impeached by the complainant, as widow, and it was set aside, and the property ordered to be sold for the purpose of paying her one-third of the proceeds, as widow. Every other question affecting the residue of the proceeds of the sale being expressly reserved.

The deeds in these cases were all made to the defendant, Eliza Ramsay, and vest in her the absolute and unqualified title to the property embraced in them. There is not upon their face the slightest reservation or indication of an interest, legal or equitable, in Jacob Faringer, and consequently his permanent trustee cannot question their validity or effect, unless she can show either that they are fraudulent under our insolvent system, or under the statute of Elizabeth, or that from the nature and justice of the case there is a resulting trust for the benefit of Jacob Faringer to be implied by law, from the fact that the consideration money was paid by him, and as trusts of this description are expressly excepted from the operation of

the statute of frauds, the fact of the payment may be established by parol proof. But although the fact of the payment of the money may be shown by parol proof, the evidence must be so strong and decisive as to leave no reasonable doubt upon the subject. The cases all concur in this because of the danger of this description of proof, not only as tending to perjury, but on account of the insecurity to which its introduction exposes the paper title. *Boyd vs. McLean*, 1 *Johns., Ch. Rep.*, 582.

In this case I have examined the proof very carefully, and though there are circumstances connected with the transaction, and the condition, habits and occupation of the parties from which it may be inferred that the purchase money for these parcels of the property was paid by Faringer, I do not find that clear and positive testimony which the principles so frequently and finally settled imperatively demand. The evidence upon this point, in my judgment, falls far below the standard established by the authorities, and I, therefore, do not feel warranted in declaring that this property is impressed with a resulting trust for Faringer.

The deed from William E. Beale to Eliza Ramsay, was executed on the 7th of April, 1845, and that of Daniel J. Hopoldt and Samuel Kramer, to the same party, on the 4th of February, 1847. On the day of the execution of the first deed, Eliza Ramsay executed a mortgage of the property thereby conveyed to her, to David N. Brown, to secure the payment of \$212, for which she had given him her promissory note, so much being due to him from Beale, and which by agreement of the parties, she, Eliza Ramsay, was to pay to Brown, and on the 31st of March, in the year 1846, the debt due to Mr. Brown having been paid by Eliza Ramsay, he, on that day, released the mortgage which she had given to him to secure its payment.

Faringer died in the year 1849, but the precise time of his death is not stated, having in the same year applied for the benefit of the insolvent laws, and the bill alleges, that the complainant was appointed his permanent trustee on the 11th of June of that year.

The bill does not allege, nor is it shown in proof, that he was

indebted at the time of the execution of the conveyances in question, unless the charge that "they were made to Eliza Ramsay for the fraudulent purpose of rendering the same free from the claims of his creditors," can be construed to amount to such an allegation. It seems to me, however, that the averment referred to, may quite as well apply to subsequent as prior creditors. But even if it is to be understood as meaning prior creditors, and that the object was to defraud them, there is no proof in support of the allegation, the existence of no such debt being shown. There is, besides, neither allegation or proof, that Jacob Faringer at the time of the execution of these instruments contemplated availing himself of the insolvent laws, or that they were made, or caused to be made by him with any such view or expectation, and, therefore, they cannot be declared to be void as frauds upon the insolvent system.

Neither upon the allegations of the bill, or the proofs in the cause, can they in my judgment, be pronounced fraudulent and void under the statute of Elizabeth, as having been made with intent to delay, hinder and defraud creditors. It is not averred, or proved, that there were any creditors at the date of those conveyances to be defrauded, hindered and delayed, nor indeed is it directly charged or proved, that Faringer contracted debts subsequently, even if the deeds could be regarded as fraudulent as against subsequent creditors. The fact of his having taken the benefit of the insolvent laws, in the year 1849, furnishes to be sure a strong presumption that he was indebted at the time, but there is nothing in the record, either in the shape of pleadings or proof, to show the amount of such indebtedness, or the value of the property which came to the hands of the complainant as his trustee. But if these defects in the case of the complainant were removed, still there would exist the difficulty of showing that the money with which the property was purchased was supplied by Faringer. It is true, there are circumstances from which it may be inferred that his money paid for the property, but it is equally true, that there are circumstances of a counter-vailing character, and the answer of the defendant responsive to the bill, stands directly opposed to any such inference.

Upon a careful consideration of the whole case, therefore, I do not feel myself at liberty to grant the relief prayed by these bills. The parties by their counsel have signed and filed an agreement that the proof taken in the first of the foregoing cases may be used in the second cause, as if taken in it, and for dividing the expense of executing the commission between the two causes which have been argued together, and depend upon the same principles. They will, therefore, be consolidated, and the bills dismissed, but under the circumstances they will be dismissed without costs.

WILLIAM M. ADDISON, for Complainant.
CHARLES H. PITTS, for Defendants.

JOHN W. WALKER, ADMINISTRATOR	}	MARCH TERM, 1848.
OF		
SAMUEL HOUSE ET AL		
VS.		
WILLIAM A. HOUSE.		

[PARTNERSHIP—PARTNERS—RECEIVER—INJUNCTION—PRACTICE.]

A RECEIVER will not be appointed upon the application of the representatives of the deceased partner against a surviving partner, unless the latter has been guilty of mismanagement and improper conduct.

If both partners are dead, and the representatives of one institute a suit for an account against the representatives of the other, the court will, as a matter of course, appoint a receiver.

Where both parties are alive, and either has a right to dissolve the partnership, and the agreement between them makes no provision for closing up the concern, equity will, as of course, appoint a receiver if they cannot arrange the matter between themselves.

Each partner has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm.

The surviving partner has, by law, a right to the custody, care, and management of the joint estate, and a court of equity will not take the business of settling it up from him, and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct.

The surviving partner alone can sue or is suable at law upon claims due to and by the firm, the executor of the deceased having a right to insist upon the

application of the joint property to the payment of the joint debts, and a division of the surplus.

If the surviving partner does not within a reasonable time account with the executor of the deceased, and come to a settlement with him, equity will interfere in an effectual way, to prevent injury to the representative of the deceased.

A court of equity will interfere, by the appointment of a receiver, with much less reluctance in the case of a partnership which has closed, than during its continuance.

In the case of a subsisting partnership, the court will never, on motion, appoint a receiver unless it appears that the plaintiff will be entitled to a dissolution at the hearing.

Upon the death of one partner, it is the duty of the survivor to cease carrying on the business of the firm; his authority from that time is limited to winding up the affairs of the partnership, and to this end he may receive the debts due to, and apply the assets in discharge of the debts due by it.

If he passes this limit, and undertakes to carry on the partnership business, or engage in new transactions, contracts, or liabilities, it is an abuse for which the court would be justified in appointing a receiver.

The death of one partner puts an end to the partnership from the time of the occurrence of that event, whether known or unknown, or whether third persons have or have not notice thereof, and any new obligations bearing the partnership signature are not binding on the firm, but only upon the surviving partner who signed them.

The executor of a deceased partner has the right to insist that the value of the property of the firm shall be ascertained by a sale; the survivors have no right to take the whole property, do what they please with it, and settle with the executor upon a calculated value.

Where an injunction is granted to preserve the property of a partnership from waste, until the application for a receiver can be heard, its continuance must depend upon the fate of the latter application; if the receiver be refused, the injunction must be dissolved.

The appointment of a receiver does not merely carry with it an authority to sell the remaining stock of the firm, but confers the general power to take possession of its books, papers, and effects, to receive its outstanding debts, and wind up its affairs.

Such appointment completely displaces and supersedes the authority of the surviving partner, putting the receiver in his place, and clothing him with all the rights and duties which the law confided to such partner.

Where an order appointing a special Auditor required him, before acting, to take an oath for the faithful performance of the duties of his office, it must appear in his report that he did take the oath; otherwise, his proceedings are wholly irregular, and the accounts stated by him cannot furnish the foundation of a decree.

[The original bill in this case was filed on the 1st of May, 1848, by the administrator, widow, and heirs at law, of Samuel House, deceased, and charges that in 1835, the deceased formed

a partnership with his son, William A. House, in a large lumber business, the father having a large capital, and the son but little; that the son was to have one-third of the profits, and the deceased two-thirds; that large profits were made from this business, but how much complainants cannot say, as they cannot get access to the books; that the deceased died on the 2d of January, 1848, and for more than a year previous had been insane and not capable of attending to business; that defendant has since had the sole management of the business, and has given no account to any of complainants of the condition of said concern, though often requested to do so, but on the contrary, and notwithstanding the dissolution of the firm by the death aforesaid, he has gone on and made purchases of lumber, for which he has given the notes of the firm, and mixed said lumber with the lumber of the firm; that since the death aforesaid, he has received more than \$10,000 of the money of the firm, and has only paid debts to about \$1900; that he has sold lumber of the firm, and rendered no account thereof, and has failed, on request, to make a settlement of the partnership affairs with the administrator aforesaid, and has refused to settle the same by arbitration, or to give security for the faithful disbursement of the partnership effects, and for payment of what, on settlement, he may owe, or to allow the books to be entrusted to an accountant, so that they may be settled; that in said books are many erroneous and improper entries made by him or his direction, many credits being entered to which he has no right, and many charges made against the deceased which are wrong; that he having charge of the cash of the firm, has charged the deficiencies in cash to profit and loss, and having control of the books, they have not been correctly balanced for years; that he has credited himself with profits, whilst he has given no corresponding credits to the deceased; that he has taken stock in incorporated companies in his own name, having paid for the same with the moneys of the concern, and not charged himself with such moneys; that the administrator aforesaid has applied to him for a balance-sheet of the business of the firm, which he has declined to give, the only

papers which he has furnished being papers marked A. B. and C., herewith filed; that complainants apprehend serious loss to the estate of the deceased, if the said partnership affairs should remain under his management; that he has been using the name of the concern for his own use and benefit, and has sold large amounts of the property of the firm, and hath not accounted therefor.

The bill, then, prays for an account, and in the mean time for an injunction prohibiting defendant from further meddling with the partnership effects, and from receiving or collecting the debts due the partnership, and from using the partnership name in any manner whatever, and from selling the property of the partnership, and that a receiver may be appointed to wind up the business of the said partnership estate, and for further relief. The bill also contains special interrogatories as to the charges above set forth.

By an amended bill filed on the 3d of May, 1848, among other things it is charged that complainants believe, from the statements made by defendant, that he is insolvent, unless he has secreted the funds and property of the said firm, and that complainants will be defrauded and irreparably injured by him, unless they can be protected by the interposition of this court.

The injunction was granted as prayed, and the application for a receiver directed to stand for hearing on a day fixed.

The answer of the defendant, filed on the 20th of May, 1848, denies fully and emphatically all the charges of misconduct contained in the bills, except so far as is explained in the opinions of the Chancellor. It is of great length, and the material parts of it are sufficiently stated in the Chancellor's opinions, the first of which was delivered upon the hearing of the application for the appointment of a receiver.]

THE CHANCELLOR :

After a very careful consideration of the facts and circumstances of this case, and an attentive examination of the authorities referred to in the argument, and others applicable to the subject, my mind has been brought to the conclusion that this is not a fit case for the appointment of a receiver.

Whatever may be the course of the court in regard to such appointment in the case of living partners, when either has a right, at his pleasure, to dissolve the connection, or where the partnership is terminated by the mere efflux of time, there cannot, I think, be found any case in which a receiver has been put in upon the application of the representatives of a deceased partner against the survivor, unless he has been guilty of mismanagement and improper conduct. *Gow on Part.*, 382; *Philips vs. Atkinson*, 2 *Bro. Ch. Rep.*, 272. It is true, if both partners are dead, and the representatives of one institute a suit against the other, the court will, as a matter of course, appoint a receiver, and the reason given for this distinction between the case of the representatives of a deceased partner suing the survivor, and the case of the representatives of one deceased partner suing the representatives of the other, when both are dead, is, that notwithstanding the death of one, confidence in the other partner remains, whereas, when both are dead, there is no confidence between their respective representatives. This is the reason given by Lord Thurlow, in 2 *Brown, Ch. Rep.*, 272, and by *Gow*, 282, 283, and *Collyer*, 197.

It was said by Chancellor Walworth, in the case of *Law vs. Ford*, 2 *Paige*, 310, that where either partner has a right to dissolve the partnership, and the agreement between the parties made no provision for closing up the concern, it was, of course, to appoint a manager or receiver on a bill filed for that purpose, if they could not arrange the matter between themselves, and this appears to be reasonable, because, as a general rule, each partner has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. But that was the case of a dissolution, *inter vivos*, where the equal rights of the partners (they being unable to agree as between themselves) would seem to render the interposition of the court in this form indispensable. But the case of a proceeding by the representatives of a deceased against a surviving partner, is wholly different; the latter, by law, has a right to the custody, care, and management of the joint estate. He is the person in whom the deceased reposed confidence, and

unless, therefore, the court is satisfied that he cannot be safely entrusted with the joint estate, the right thus conferred upon him by law, and confirmed by the confidence of his deceased partner, should not be wrested from him.

Chancellor Kent says, on the dissolution by death, the surviving partner settles the affairs of the concern, and the Court of Chancery will not take the business from him and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct. 3 *Kent's Com.*, 63, and see *Evans vs. Evans*, 9 *Paige*, 178. The surviving partner alone can sue or is suable at law upon claims due to and by the firm, the executor of the deceased having a right to insist upon the application of the joint property to the payment of the joint debts, and a division of the surplus. *Ex parte Ruffin*, 6 *Ves.*, 126. And if within a reasonable time the survivors do not account with him and come to a settlement, a court of equity will interfere in an effectual way to prevent injury to the representatives of the deceased.

But still there are rights and duties which devolve upon a surviving partner upon the death of his associate, and he is to be allowed a reasonable time for their performance, during which this court will not interfere and transfer them to other hands, unless by acts of mismanagement or misconduct, the confidence otherwise due him shall be destroyed. *Gow*, 378; *Story on Part.*, sec. 344; *Hart vs. Schrader*, 8 *Ves.*, 317.

The counsel for the complainants has pressed upon the court the distinction between the case of a subsisting partnership, and one which has terminated, whether by the act of the parties, effluxion of time, or death, or bankruptcy. And there can be no doubt that the court will interfere by the appointment of a receiver, with much less reluctance in the case of a partnership which has closed, than during its continuance. The reason for this difference is pointed out in the cases referred to by Judge Story in section 231, in his treatise on the Law of Partnership, and the note to the section. The reason, in truth, is an obvious one. In the case of a subsisting partnership, the court will never interpose in this way unless for such gross

abuse and misconduct on the part of one partner as that a dissolution ought to be decreed, and the affairs of the concern wound up, for otherwise as observed in one of the cases, the court might make itself the manager of every trade in the kingdom. *Goodman vs. Whitcomb*, 1 *Jacob and Walker*, 569. It, therefore, results that the court will never, on motion, appoint a receiver to take possession of the property and effects of a subsisting partnership, unless it appears that the plaintiff will be entitled to a dissolution at the hearing. The court, as was said by the lord chancellor, in *Waters vs. Taylor*, 15 *Ves.*, 10, and *Peacock vs. Peacock*, 16 *Ves.*, 57, will always pause before it takes a step likely to be so serious to the parties as the appointment of a receiver, which necessarily breaks up the business of the firm.

But, although there is less difficulty in granting this species of relief in the case of a partnership which has already determined, than in one which is still in existence, and although cases may be found in which, where the partnership is dissolved by the act of the parties, judges have said the court will, as of course, appoint a receiver, as in the case of *Law vs. Ford*, 2 *Paige*, 310, and although a similar course may be proper when all the partners are dead, and there consequently is no one living upon whom the original confidence of the partners, *inter sese*, can have devolved, yet I am fully convinced that no case or *dictum* can be found in which, in a proceeding against a surviving partner by the representatives of the deceased, the court has appointed a receiver, without being satisfied, by the mismanagement or improper conduct of the surviving partner, that the confidence reposed in him was misplaced. The authorities already referred to, establish this proposition, in my opinion, very clearly, and are in nowise contravened by the cases of *Wilson vs. Greenwood*, 1 *Swanst.* 481, and *Harding vs. Glover*, 18 *Ves.*, 281. Indeed, in the last case, Lord Eldon expressly disavows the principle that the court will, as of course, appoint a receiver upon the mere ground of the dissolution of the partnership, and says there must be some breach of duty, or of the contract of partnership.

The present, then, being the case of a bill filed by the representatives of a deceased against a surviving partner, the fate of the motion for a receiver must depend upon the result of the attempt upon the part of the complainants to convict the defendant of improper conduct in the management of the business of winding up the affairs of the concern.

There can be no doubt that upon the dissolution of this partnership by the death of the senior partner, that it was the duty of the survivor thenceforth to cease altogether from carrying on the trade or business in which the parties had been before engaged. His authority from the period of the death of the deceased partner was limited to winding up and settling the affairs of the partnership, to which end he was authorized to receive the debts due to, and apply the partnership assets and effects in discharge of the debts and other obligations due by it. If he passed beyond this boundary, and undertook thereafter to carry on the partnership trade or business, or engage in new transactions, contracts or liabilities, on account thereof, it was an abuse for which the court might be justified in appointing a receiver. *Story on Part., secs. 322, 342, 343, 344.* But is there in this case any satisfactory evidence of such misconduct? The bill charges various acts of misconduct, but those are all denied by the answer except two, which are explained and justified. It is to be recollected in this case, that the connection in business between the deceased and the surviving partner, commenced as far back as the year 1829, and continued uninterruptedly from that time to the death of the elder Mr. House, in the month of January of the present year. Though the firm had changed twice during the period by the introduction or retiring of other parties, the relation between these parties remained unbroken during this long period. It is true, it appears, that on or about the 1st of January, 1847, the elder House fell into a state of mental and bodily infirmity which incapacitated him from that time to his death from attending to his affairs, but from the year 1829 to 1847, a period of eighteen years, there is nothing to show that he was not in the full possession of his faculties of mind and body, and that he did not give every necessary and proper attention to his business.

The present bill was filed on the 1st of May, 1848, and seeks, upon allegations of misconduct and abuse against the defendant, to show that a confidence confirmed and reposed by a connection of eighteen years duration, was misplaced and that the party in whom it was confided is unworthy to be entrusted with the performance of those duties which the law devolves upon him. I have remarked that all the acts charged against the defendant, in the bill, and which are alleged to be in violation of his duty as the surviving partner, are denied, except two, in regard to which an explanation is offered. But it is by no means certain that the answer admits more than one act which did not fall strictly within the limits of his duty. It was unquestionably the right and the duty of the defendant, as surviving partner, to collect the assets of the firm, and apply them in discharge of its obligations, and it is certainly very far from being apparent, that in that part of his answer in which he speaks of the amount of the debts of the firm, which he has paid in the interval between the death of the senior partner to the time of filing the bill in this case, he means to be understood as saying he has done more than this.

It is true, he says, the amount thus paid very much exceeded the sums received from collections and sales, and that he was compelled to resort to the aid of loans, and to his private resources, but it by no means follows that these loans were effected upon the partnership responsibility, or that any new obligation or contract binding upon the partnership was created. It does not appear, in fact, that any new obligations were issued in the name of the partnership growing out of the transactions of which I am now speaking, and even if such was the case, as the dissolution by death puts an end to a partnership from the time of the occurrence of that event, whether known or unknown, or whether third persons have or have not notice thereof, such new obligations bearing the partnership signature, would not be binding upon the firm, but only upon the surviving partner who signed them. But conceding the firm would be bound, still, as according to the answer, the money raised in this way was applied in extinguishment of claims against

the firm created prior to the dissolution, it might be very fairly insisted that it is not the creation of a new obligation at all, the person to whom the new obligation is given being substituted for, and simply standing in the shoes of the old creditor whose debt is discharged.

The allegation of the bill is, that defendant has been using the name of the firm for his own use and benefit, and has sold large amounts of the property of said concern without accounting therefor. These allegations are by the answer emphatically denied.

There is, however, one allegation of the bill, in which the surviving partner is charged with acts not warranted by his duty, which is, to a certain extent, admitted by the answer, though an explanation of it is offered, which, in my judgment, disarms the charge of much of its point. The bill alleges that notwithstanding the firm was dissolved by the death of Samuel, the surviving partner has gone on and made purchases of lumber, for which he has given the notes of the firm, and mixed said lumber with the lumber of the firm. The answer, whilst it denies the mingling of the newly purchased lumber with the stock of the firm, and whilst it states that the lumber so bought was kept separate from, and sold, and entered in the books, so as to distinguish the proceeds of its sales from the proceeds of sales of the old stock, does, nevertheless, admit the fact that such purchases to a small amount were made, and the notes of the firm given for them. The amount of lumber so purchased was less than four hundred dollars, and as the answer states, was required to keep up an assortment, and aid in the sales of the stock on hand at the time of the dissolution of the partnership, and the answer also states that the parties to whom the notes were given, knew of the death of Samuel House, (though this, as we have seen, is immaterial,) and that the surviving partner was alone responsible.

I cannot bring myself to think that an act like this, designed and perhaps well calculated to aid in winding up the affairs of the firm advantageously, and which the defendant says, in his answer, shall not be repeated, can subject him to the charge of

improper conduct, and show that he cannot be safely entrusted with the joint estate. And unless this is satisfactorily established, the court, according to *Mr. Gow*, will not exercise its power and appoint a receiver to collect in, and dispose of, the property. *Gow*, 382.

But although, according to the authorities, the legal title in the property of the partnership, in the event of the death of one survives to the others, the beneficial interest does not so survive, and it is the duty of the survivors within a reasonable time to settle up the business and account with the executor of the deceased for such interest, and if they fail to do so, a court of equity will grant an injunction restraining them from disposing of the joint stock and from receiving the outstanding debts. *Gow*, 378, *Story on Part.*, sec. 322, note 1. And the executor has a right to insist that the value of the property of the firm shall be ascertained in the way in which it can be best ascertained, by a sale. The surviving partners have no right to take the whole property, do what they please with it, and settle with the executor upon a calculated value. *Crawshay vs. Collins*, 15 *Ves.*, 218, 226; *Story on Part.*, sec. 322, note 1. The defendant in his answer expresses the opinion that the stock of this partnership can be disposed of at private sale most advantageously, but at the same time declares his willingness, if the administrator of the deceased partner desires it, and the court so direct, to sell the whole at public sale.

Samuel House, the deceased partner, died in the month of January of the present year, and the bill in this case was filed on the first of this month, being but four months from the death of the deceased partner. It is quite clear, therefore, that a reasonable time has not been allowed for adjusting the business of the concern, and on that ground, there is no foundation for the interposition of the court in the form in which its power is invoked. And as the charge of insolvency against the surviving partner is most explicitly denied by the answer, it is impossible to say that there will be danger in confiding to him the management of the joint estate, which the law confessedly devolves upon him.

I am, therefore, of opinion, that the motion for a receiver must be disallowed.

[An order was then passed overruling the motion for a receiver. A motion was then made by the defendant to dissolve the injunction granted upon the original bill. Upon the hearing of which, the Chancellor delivered the following opinion on the 26th of June, 1848. Proof was also taken prior to the hearing of this motion, the purport of which sufficiently appears in the Chancellor's opinion.]

THE CHANCELLOR:

After hearing the argument of counsel, the court is about to dispose of the motion to dissolve the injunction heretofore granted in this case.

The bill which prayed for an injunction prayed also for the appointment of a receiver, and the propriety of the observation made in the argument, that the injunction should not be continued unless a receiver is appointed, is apparent. The injunction was ordered as a temporary measure to preserve the property from the waste with which, according to the bill, it was threatened, until the application for the receiver could be heard, and for obvious reasons its continuance must depend upon the fate of this latter application. To allow the injunction to stand without appointing an agent to collect the debts due the partnership, dispose of its property, pay its obligations and wind up its affairs, would be injurious to the interests of all parties and an abuse of the power of this court. In effect, therefore, this motion involves the question of appointing a receiver and every consideration which could influence the mind of the court upon a motion having that direct object in view must be weighed upon this occasion.

The court has already expressed an opinion upon the propriety of appointing a receiver on the bill, answer and exhibit, and that opinion was adverse to the application. And upon a careful re-examination of the reasons which brought me to the conclusion then formed, I have found nothing to make me dissatisfied with

it. It appears to me, then, and does now, that every allegation in the bill upon which, according to the established doctrine of this court, the propriety of appointing a receiver rests, was neutralized by the answer, and consequently, that, I should be interfering with the legal title, and wresting from the surviving partner the right which the law devolves upon him, without any evidence of a breach of duty or of the contract of partnership on his part.

The question, therefore, now to be considered is, whether there is in the evidence any thing which will justify the court in continuing this injunction, involving as its continuance does, the appointment of a receiver?

It was observed by the counsel who concluded for the plaintiffs, that, inasmuch as the defendant had expressed his willingness to sell immediately the remaining stock of the firm, if the court should direct it, it was a mere question whether this sale should be made by the agent of this court, who would be required to give security, or by the defendant who gives none. This view of the question appears to me to be too narrow. The appointment of a receiver does not merely carry with it an authority to sell the remaining stock of the firm, but confers the general power to take possession of its books, papers and effects, to receive its outstanding debts and wind up its affairs. It completely displaces and supersedes the authority of the surviving partner, putting the agent of this court in his shoes, and clothing him under its supervision with all the rights and duties which the law confided to the surviving partner. The management of his own interest in the concern, be it great or small, is taken from him and lodged elsewhere, and probably in hands not having the advantage of his skill and experience.

It seems to me that to give to an offer such as is contained in this answer, dictated as it manifestly was by a willingness on the part of the defendant to submit himself unreservedly to the authority of the court, and to comply with the wishes of his adversary, the effect contended for would be to pervert it to a purpose never contemplated, and, under the circumstances, unjust.

It is true, that this partnership is dissolved by the death of one of the partners and that nothing remains but to wind up its affairs, and, therefore, no weight is to be attached to the argument that the appointment of a receiver will break up the business. The business, except for the purpose of settling up the affairs of the firm is broken up by the death of the senior partner, and I am not restrained from appointing a receiver because such appointment will bring the affairs of the firm to a close.

The objection to the motion is, that here is a party who by law is entitled to retain possession of the partnership effects and wind up its business. *Egberts vs. Wood*, 3 Paige, 517; *Collyer*, 63, note 1. A party between whom and the deceased there existed a confidence, the benefit of which devolves upon the survivor upon the death of his associate. *Philips vs. Atkinson*, 2 Brown's Ch. Rep., 272; *Daniel's Ch. Pr.*, 1969. The court, in my opinion, has no right to take from the surviving partner the power resulting from that position, unless a case is made out showing that the interests of other parties are in danger from the continued exertion of the power. Show that the survivor has been guilty of a breach of duty, or of the contract and partnership, that he is wasting the funds of the firm, and the court will be prompt to interfere for the protection of the estate of the deceased partner by the appointment of a receiver. *Higginson vs. Air*, 1 Desaussure, 429.

In this case the amended bill, in order to show that the interest of the representatives of the deceased partner were in peril, alleges, though not in very specific terms, the insolvency of the defendant. This allegation, however, is swept away by the explicit denial of the answer, and there is not only no proof, but no attempt has been made to prove the truth of the allegation. The case is consequently to be regarded as if no such averment had been made, and it remains to be considered whether any other facts are alleged and proved, upon which this court can with propriety take the settlement of the affairs of this partnership from the hands of the surviving partner.

The attempt to create distrust in his integrity by the allega-

tions, and the effort to establish by proof, that he had covered up deficiencies in the cash means of the firm by forced entries in the books, has signally failed, it appearing upon examination, that so far from deficiencies in the cash being concealed by such means, surpluses to a considerable amount have been disclosed, which, but for the entries in question, might never have seen the light. The effect of these entries as explained by the witnesses, and indeed as is apparent upon their face, was to increase the funds of the firm, and of course to benefit the partnership. The defendant if dishonest, might have put the money in his pocket, or applied it to his individual use, but knowing it to have been derived from the sales of the property of the firm, or from collections, or however derived, to belong to the partnership, he made such entries in the books as the occasion required.

It is insisted that the necessity for these entries betrays a want of skill and care in the management of the business which should predispose the court to appoint an agent to take charge of it. Entries of the character referred to, have certainly an appearance of negligence, and may indicate a want of skill, but the manner in which the business was conducted, is supposed to relieve the defendant from a part, at least, of the imputation which might, under different circumstances, attach to him. It appears that various agents were employed in selling lumber, and the entries in the books were made from the reports of these agents, and it is quite as likely that these agents neglected to report sales, or the receipt of cash, as that being reported the book-keeper omitted to make the proper entry. At all events, the fact of the subsequent entries having the effect to benefit the firm, and in a corresponding degree prejudicing the defendant as an individual, rescues the transaction from the injurious interpretation which might otherwise be put upon it. It is more than probable, that he might have appropriated these excesses of cash to his own use without detection, and that he did not do so, but by proper entries in the books threw them into the general funds of the firm for the benefit of the partners, cannot be allowed to impair the confidence which the deceased partner so

long reposed in him, and to which he is consequently entitled in the eye of this court.

The next transaction relied upon to justify the appointment of another person to wind up the affairs of this partnership, has regard to the stock alleged to be held by the firm in what is called the Baltimore Eagle Works, and the proof of Mr. Gist.

It is said by the defendant, that an inspection of the books will entirely and satisfactorily explain this transaction, and will show that this stock was not partnership property, but the property of the individual partners. The complainant's counsel resists the right of the defendant to refer to the books for this purpose, upon the ground that those books were not filed in the cause as evidence, but were merely brought in by the defendant to be made evidence if the plaintiff chose to do so. Without considering this question at this time, and conceding that the transaction in relation to the stock in question requires explanation, I do not think it can have the conclusive effect imputed to it, and that all the consequences of a fraudulent concealment of property are to be visited upon the defendant. It is to be recollected that in the paper maked exhibit A, which purports to be a full statement of the funds and property of the firm, an interest in or claim against this company is set down among the assets, thus directly inviting the attention of the complainants to it. Now is it reasonable to suppose if the fraud imputed to the defendant was contemplated by him, that he would have put the opposite party upon the track, by pursuing which, exposure was inevitable. It is true, such fatuity is sometimes seen in the affairs of life, and frauds apparently shrouded in impenetrable mystery are brought to light by conduct wholly irreconcilable with the cunning with which they were perpetrated. But still it cannot be denied that this pointing the adverse party to the source from which the fraud, if committed, might readily be detected, is a circumstance from which a presumption favorable to the defendant should be drawn.

One of the arguments principally relied upon to show a want of capacity or integrity on the part of the defendant, and that consequently he is unfit to be trusted to wind up this partner-

ship, is founded upon the supposed discrepancies in the statements furnished by him to the complainants of its condition. It is alleged that he has given statements professing to show the indebtedness of the firm, which, whether from design or carelessness, are so grossly inaccurate that no confidence can be reposed in him.

It appears that very shortly after the death of Samuel House, Sr., the complainant, Walker, called on the defendant for a statement of the condition of the partnership, and upon being informed that it would not just then be very convenient to furnish it, he said he would be satisfied with a rough statement. Upon this a statement was made out, professing to give the amount of claims against the firm up to the 1st of January, 1848, the period of the death of Samuel House. According to this statement, which gives the names of the creditors in initials, the indebtedness of the firm amounted to \$31,681 38. This statement, which is filed as an exhibit with the bill and marked C., being, as alleged in the answer, found to be inaccurate, owing to the cause therein assigned, another paper was prepared and marked as defendant's exhibit, W. A. H., No. 2, giving a list of other claims against the firm up to the same date, to wit, the 1st of January, 1848, amounting to \$8,334 61, making an aggregate of indebtedness of \$40,015 99. Subsequently, about the 12th of April last, the defendant gave the complainant another statement of the indebtedness of the firm, in which the names in full of the creditors are given, and amounting to \$31,255 92. In this statement, filed as exhibit (B.) with the bill, are many items of indebtedness not to be found in either of the other statements, and it is contended by complainant's counsel that the items not so embraced in the previous statements are distinct and independent debts, and show the firm to be indebted to an amount greatly exceeding the first representation of its condition.

It is stated in the answer of the defendant in the reply to an interrogatory of the bill, and appears by his exhibit, W. A. H., No. 5, that the sums paid by the defendant since the death of Samuel House, up to the 3d May last, amounted to \$27,775 35,

and that to enable him to do this he was compelled to borrow, in various modes and from various persons, upon his own personal credit, nearly \$15,000. The receipts from partnership assets and the cash on hand at the death of Samuel House being only \$13,383 34. Hence it follows that though the creditors of the firm have been paid to an amount exceeding \$27,000, this has been accomplished, if the answer and exhibits are to be relied upon, upon the individual credit of the surviving partner to the amount stated above, and that he, in respect of these advances, was entitled to be substituted as a creditor of the firm in the place of the original creditors who had been paid by means raised upon his credit.

When comparing the statement of the debts of the firm which have been paid by the defendant with the papers marked C. and W. A. H., No. 2, it will be found that a very large amount of the claims embraced in these two papers have been paid, and consequently when the statement of the liabilities of the firm marked (B.) was prepared on the 12th of April last, the names of the creditors whose claims were embraced in the previous statements, and who had been paid, do not appear. But the paper marked B., although it did not contain the names of the creditors mentioned in paper C. and W. A. H., No. 2, who had been in the interval, between the 1st of January and the 12th of April last, does, as is alleged in the answer, contain the names of those parties from whom the defendant had borrowed the means to pay claims against the firm so much exceeding the amount which had been realized from its assets. If this statement is true, and the exhibits filed with the answer and the proof of O'Donnell support it, then the items of indebtedness embraced in exhibit (B.) and which are not to be found in exhibits C. and W. A. H., No. 2, are not new and distinct items of indebtedness, but these new creditors whose names are contained in exhibit (B.) merely take the place of the old creditors whose claims were paid by means procured from them. There was some irregularity, it is true, in putting down the names of the parties from whom the defendant had borrowed money and notes, as creditors of the firm. They were in truth creditors of the sur-

viving partner, but as the latter upon settling the affairs of the partnership would be entitled to be reimbursed for his advances to pay its debts, the actual condition of the concern was correctly stated. The answer, as it seems to me, explains this matter satisfactorily, and all its statements in this respect are fully sustained by O'Donnell the clerk.

Upon a careful examination of the various exhibits filed with the answer which were prepared, as it appears, to meet the several and special interrogatories of the bill, it will be found, I think, that they support the statements of the answer with regard to the condition of the firm. It would be tedious to go through them in detail, and I content myself, therefore, by saying, that I can find nothing in them calculated to make an impression unfavorable to the integrity of the defendant, or upon which I can say the confidence reposed in him by the deceased partner was misplaced.

A good deal has been said about the manner in which the books were kept, and the neglect to subject them to the test of periodical settlements and balances. Upon this part of the case, however, it must be recollected that the deceased partner could not have been ignorant of this omission. The partnership had existed for many years, and during the whole period, except the last year of his life, the deceased is conceded to have been an active, energetic and intelligent man of business. It is impossible to suppose that he did not know how the books were kept, and now after his death to urge a defect in this particular, with which he must have been familiar, and to which he must be presumed to have given his assent, as a reason for withdrawing confidence from the surviving partner does appear to me to be rather a rigorous measure of justice.

Seeing then that the charge of insolvency as made in the amended bill is entirely overthrown by the answer, and that no attempt has been made to establish it by proof, and being by no means satisfied that any improper conduct has been fastened upon the defendant, or that he has shown himself unfit to be entrusted with winding up the affairs of this firm, a duty and a right which the law confers upon him, the prohibitory process

of this court interposed as a measure of precaution must be withdrawn.

To leave the injunction in force and appoint a receiver to settle up the affairs of this partnership, without showing the existence of one or the other of these causes for such interposition, would be to establish a principle which might make this court the manager of half the partnerships in the state, a result which, in the former order, was shown to be deprecated by a distinguished Chancellor of the parent country.

[In the course of the subsequent proceedings in the cause, a decree was passed for an account and referring the case to a special Auditor for the purpose of stating the account from the pleadings and proofs in the case, the books of the firm and such other proof as the parties may produce before him upon giving the usual notice. The decree also directed that before he should proceed to act as Auditor in the case, he should make oath before some justice of the peace that he will well and faithfully execute the duties of his said office as Auditor in this case without favor, affection, partiality or prejudice.

Upon the coming in of his report, various exceptions were filed to it by the defendant. Among others that it states the Auditor's fee at the amount of \$863 33, which the exceptant charges to be enormous, unreasonable and excessive. The character of the other exceptions sufficiently appears from the following opinion of the Chancellor delivered at the hearing thereof.]

THE CHANCELLOR :

This case is brought before the court and has been argued by counsel upon exceptions to the report of the special Auditor, and the several accounts accompanying the same, filed on the 24th of April, 1849.

The decree for an account passed on the 1st of August, 1848, by which the special Auditor was appointed, as is usual, directed that he should, before proceeding to act, make oath that he would

well and faithfully execute the duties of the office conferred upon him. His report does not inform the court whether he did or did not do so, and the defendant has made this apparent omission to qualify, the ground of a special exception, and there can be no doubt that unless the Auditor did take the oath required by the order appointing him, that his proceedings were wholly irregular, and the accounts stated by him, unless this objection be waived, cannot furnish the foundation of a decree.

With this remark, the case as it now stands, might be disposed of, but in order to facilitate the future progress of the cause, I shall proceed very briefly to notice some of the exceptions to the report.

The defendant's first exception is directed against the discrimination which the Auditor has made in his account A., which is a copy or abstract of the balance sheet of the firm, and in which he places the assets in distinct columns, designating a portion as doubtful and others simply as "assets" without designation.

The exception insists that many of the claims ranged under the head of "assets," are in fact doubtful or not likely to be recovered. The Auditor, in a paper filed on the 18th of January, 1850, verified by his affidavit, states that this discrimination was made upon information derived from the defendant himself. But this statement of the Auditor cannot certainly be received as evidence, being *ex parte*, and not warranted by the terms of the order under which he was acting, which required that proof should be taken on *notice* to the parties.

The court could not, therefore, undertake to charge the defendant with the amount of assets placed in the column designated simply as such, nor can any settlement of the partnership accounts be made upon such basis.

[Other exceptions, which are not deemed material to be reported, were then considered by the Chancellor and sustained. As to the objection to the Auditor's fee, the following are the remarks of the Chancellor.]

The 25th exception objects to the amount of fees claimed by the special Auditor for preparing and stating the accounts.

The Auditor states that he was engaged in the work 186 days, which at the rate of charge allowed by law, amounts to the sum claimed.

I do not propose now to decide finally upon this exception. I am not aware that any case has ever occurred before in the court in which the fees of the Auditor amounted to so large a sum, and I shall, therefore, leave the point open for explanation and proof on both sides.

It was observed in the course of the argument that the defendant was not consulted, and indeed had no notice, that the appointment of a special Auditor would be applied for, or who would be nominated, until after the decree of the 1st of August had passed.

The Chancellor was under a different impression, but in consideration of the statement now made by the defendant's solicitor, and without in the slightest degree intimating that the appointment was an injudicious or improper one, the case will not now be sent back to the same Auditor, it being deemed best to give the parties an opportunity of presenting their views upon the subject.

A reasonable time will be allowed for that purpose, after which an order will be passed, giving such directions for stating the accounts as the present condition of the cause may seem to justify.

PRATT and GLENN, for Complainants.

WILLIAMS and SCHLEY, for Defendants.

ESTATE OF LORIMAN CHEW,
A LUNATIC.

} JUNE TERM, 1849.

[LUNATIC—LUNACY.]

IF the committee of the person and estate of a lunatic has given a well secured bond for the faithful administration of his trust, and is in other respects a fit person to have the custody and estate of the lunatic, his insolvency, in fact, (not having taken the benefit of the insolvent laws,) is not cause for removal.

[William Goldsborough was appointed committee of the person and estate of Loriman Chew, a lunatic, and gave bond with sureties for the faithful performance of his duties. After his appointment he became insolvent, and his securities filed the petition referred to in the following opinion of the Chancellor.]

THE CHANCELLOR:

This is an application by the sureties of William Goldsborough, the committee of the lunatic, to compel him to execute another bond, with other and different sureties, upon the allegation which is not disputed that he has become insolvent. The prayer of the petition is, that he may be compelled to execute another bond with other and different sureties, and that if he fail to do so within a time to be limited by the court, that his appointment may be revoked. The petition prays also for further relief, and the question submitted is not that the committee shall be required to give another bond, for it is conceded he should be required to do so, but that whether he offers a satisfactory bond or not, he shall be removed from his trust, because he has become insolvent.

It seems to be settled in England, that the bankruptcy of the committee of the estate of a lunatic, is a sufficient ground for his removal, and that if the committee of the person become a bankrupt, it is a reason for removing him on account of the fund for his maintenance, for, as the Lord Chancellor said in *Exparte Mildmay*, 3 Vez., 2, "if I order a sum of money for his maintenance, I cannot put that sum in the hands of a person over whose administration of it I have no control." This was said of an uncertificated bankrupt, but to whom, as was asserted, a certificate would probably be allowed in a short time. See 1 *Collinson on Idiots*, 250, 313; 2 *Madd. Ch. Pr.*, 742.

In the case now under consideration, the committee is not a technical insolvent. He has not, nor is it alleged that he contemplates applying for the benefit of the insolvent laws, and, therefore, the remarks of the Chancellor in *Exparte Mildmay* do not apply, because the administration of the estate of the lunatic in his hands is entirely under the control of the court.

The question, it appears to me is, has the committee given a well secured bond for the faithful administration of his trust? If he has, and he is in other respects a fit person to have the custody of the person and estate of the lunatic, it is not thought that the condition of his private affairs (unless perhaps when it is shown that he has taken the benefit of the insolvent laws) will be regarded as a cause for removal.

It is to be recollected in this case, that no misconduct on the part of the committee is charged, the application resting exclusively upon his insolvency in fact. And it should also be remarked, that though the petition contains a prayer for further relief, the particular relief, and, indeed, the only relief which seems to have been contemplated when the proceeding was instituted, being for a new bond in place of the old one. The application, it is also to be observed, is by the sureties in the bond, who seem in no way connected with the lunatic, and whose only object appears to have been to be exonerated from their responsibility as such sureties. Upon a petition so framed, and by such parties, I do not think I should be justified in removing the committee, and will, therefore, pass an order requiring him to give a new bond within a reasonable time.

WILLIAM A. HOUSE
vs.
JOHN W. WALKER ET AL.

} SEPTEMBER TERM, 1853.

[OBJECTION TO CHANCERY SALE—INADEQUACY OF PRICE.]

MERE inadequacy of price in a chancery sale, unless so gross and inordinate as to furnish, *per se*, evidence of fraud or misconduct on the part of the trustee, is not sufficient cause for setting the sale aside or refusing its ratification.

[The facts in this case are fully stated in the Chancellor's opinion.]

THE CHANCELLOR:

In the year 1849, three decrees were passed for the sale of certain parcels of real and leasehold estate in the city of Baltimore, owned by the late Samuel House, or in which he was interested. The sales have been made, and reported by the trustees appointed for that purpose, and Samuel House, Jr., one of the parties interested, having excepted to their ratification, in which exceptions other of the parties having concurred, the question now presented and submitted without argument on either side is, whether these sales shall or shall not be ratified?

There is no pretence in any part of these proceedings that the sales were not regularly and fairly made in conformity with the decrees, or that there was any the slightest fraud or misconduct on the part of the trustees, or surprise upon the parties objecting to the sales, or that they were in any way misled as to the time and place of sale. The objection to the ratification of these sales rests upon the single allegation that the property sold for a sum below its value, and all the proof which has been taken has been directed to this point and none other.

Upon carefully reading this proof, I am by no means satisfied that any very material inadequacy of price has been shown. The evidence is undeniably contradictory, and there would be some difficulty in coming to a satisfactory conclusion upon the subject, if the duty of collating and weighing the testimony for the purpose of determining that point were forced upon the court.

But this is not necessary. It has been over and over decided in this State, that mere inadequacy of price in a Chancery sale, unless so gross and inordinate as to furnish evidence of fraud or misconduct on the part of the trustee, is not sufficient to induce the court to set it aside or refuse its ratification.

This principle was announced in the case of *Cohen vs. Wagner*, 6 Gill, 97, where property, assumed to be worth \$20,000, sold for but \$13,000. And in the case of *Johnson vs. Dorsey*, 7 Gill, 269, in which the previous authorities were carefully collected and examined, the principal was carried still further, the disproportion between the assumed value of the property and the price bid for it being greater.

In the case now under consideration, no possible construction of the evidence can establish that gross inadequacy of price which will, *per se*, furnish evidence of misconduct or fraud on the part of those who conducted the sales, and there is not only a total absence of proof of any such misconduct in the other circumstances attending them, but the testimony shows that the trustees discharged their duty fairly and faithfully in all respects.

The sales, therefore, will be ratified, the exceptions being overruled, and the Auditor is requested to examine the vouchers for expenses and taxes, and apportion them properly.

IN THE MATTER OF THE
TRUST ESTATE OF
JANE BLAKE, DECEASED.

} DECEMBER TERM, 1853.

[CONSTRUCTION OF WILL—ANNUITIES.]

A TESTATRIX devised her real estate to her executor, in trust, to sell the same and invest the proceeds to pay the legacies and annuities in her will. She then bequeathed to her sister an annuity of one hundred dollars during her life; to her niece, fifty dollars per annum during her life; to each of the children of her said niece now living, or hereafter to be born, one hundred dollars per annum, payable as they respectively attained the age of five years, and to continue until they were old enough to be put out to trades. She also gave other pecuniary legacies to the same children as they respectively arrived at age or married. The interest of the trust fund was inadequate to pay these annuities. HELD—that they could not be paid out of the *principal* of the estate.

[The testatrix, Jane Blake, by her will, referred to in the opinion of the Chancellor in this case, devised all her real estate to her executor, in trust, to sell the same and apply the proceeds in aid of her personal estate in payment of her debts and the legacies specified in her will, “and in trust also to invest so much of the said proceeds of sale as he may think fit, in such stock funds, or mode of investment as he may think fit,

to pay said legacies and the annuities hereinafter mentioned," with authority to change the investments as in his judgment may be proper. The will then proceeds as follows:

"Item. To my sister, Catharine Kelly, now of Baltimore, I give and bequeath one hundred dollars a year during her life, the said annuity to be due and payable six months from the day of my decease, and annually thereafter, during her life."

"Item. To my niece, Mary Jane Hickey, daughter of my said sister, I give and bequeath fifty dollars a year during her life, for her sole and separate use, and free from the control of her husband or any liability for his debts, to be due and to commence twelve months after the day of my decease, to cease, nevertheless, entirely, if she should leave her husband without cause satisfactory to my executor."

"Item. To each of the children of my said niece, Mary Jane Hickey, who are now living, I give and bequeath the sum of one hundred dollars, per annum, to be applied to the purpose of educating them in a plain and useful manner—these annuities to commence to each of them as they shall, respectively, arrive at the age of five years, or at such other period as my executor shall think they are old enough to be put to school, and to cease as to each of them when my executor shall think they, respectively, arrive at such an age as that it will be proper to put them out to trades. If my said niece shall, hereafter, have other children, then at the death of my said sister, the annuity given to her to be applied, along with the annuities herein given to the children of my niece who are now living, in like manner, and for the same purposes, and on the same terms, to all the said children equally, whether now born or hereafter to be born, and to cease as before mentioned to each of them, respectively, on their arriving at an age when my executor may think they should be put out to trades."

Several pecuniary and specific legacies are then bequeathed to other persons, after which the will proceeds as follows:

"Item. To each of my said niece's children now living, or who may be hereafter born, I give and bequeath the sum of one hundred dollars, to be paid to them on their arrival at age, res-

pectively, to assist in setting them up in their several trades. If any of the said children die before arriving at the age of twenty-one years, the legacy by this clause given to the said child or children, so dying, to go and be distributed equally among the rest of said children."

"*Item.* To each of my said niece's children now living, or hereafter to be born, I bequeath the further sum of five hundred dollars, to be paid to them severally, upon their arriving at the age of twenty-one years, or upon their marriage, if that shall be before their arrival at age, provided they marry with the approbation of their father and my executor, and not otherwise, and if any of the said children die before arriving at the age of twenty-one years, as aforesaid, or before marriage, then the legacy or legacies in this clause of my will, given to such child or children, so dying, to be distributed upon their arrival at age or marrying, with the approbation aforesaid, among the survivors of my said niece's children. And if my estate, after paying my debts and the other legacies given in this will, shall not be sufficient for the payment of the legacies given in this clause of my will, then the said legacies of five hundred dollars to be abated ratably, according to the deficiency of my estate."

The executor named in the will declining to act, T. P. Scott, Esq., was, by a decree of this court, appointed trustee in his stead, and directed to sell the real estate of the testatrix, and to bring the proceeds into court, to be invested under the direction of the Chancellor, for the uses and trusts mentioned in said will. The property was accordingly sold, and the proceeds proving insufficient to pay them, by the interest thereon, the annuitants mentioned in the will, Catharine Kelly, Mary Jane Hickey and her four infant children, filed their petition in the cause, asking that the annuities payable to them, and the arrearages thereon now due, might be paid to them out of the whole estate. Upon exceptions to the Auditor's accounts, the following opinion of the Chancellor construing the will, was delivered.]

THE CHANCELLOR:

The exceptions to the report of the Auditor, of the 20th of December, 1853, and the accounts, C. and D., therewith submitted, standing ready for hearing, and having been argued on the part of some of the legatees of Jane Blake, the same, together with the proceedings in the cause, have been read and considered.

The only question of importance is whether the annuities bequeathed by the testatrix to her sister and niece, and the children of her niece, are to be paid out of the principal of the trust estate, or its income, which it is apparent is inadequate for that purpose.

With every proper disposition to give to these annuitants, who are represented to be very needy, all the relief to which, upon a fair construction of the will they are entitled, I have come to the conclusion, that by directing the annuities to be paid out of the capital of the estate, I should break up the entire scheme of the will, and defeat the leading object of the testatrix. It is clear, beyond question, that the income of the estate is totally inadequate to pay the annuities now due, and to become due, and that if the sums now payable to the four annuitants are paid out of the principal, and the latter is subjected in like manner, from year to year to the discharge of the same annuities as they fall due, the capital of the trust estate will, in a very short time, be entirely absorbed, and nothing will be left for the children of Mary Jane Hickey who have not yet attained the age of five years, the period specified in the will when the annuities begin to run.

There is nothing upon the face of the will, or any circumstances out of it, if any thing out of the will could be resorted to, to warrant a construction productive of such consequences, and, I therefore, conclude, that the annuities are to be paid out of the income of the estate, as far as it will go, and not from the principal.

The clauses of the will which give certain pecuniary legacies to the children of the testatrix's nieces at future periods, would also be defeated by the construction contended for on the part

of the annuitants, but as these legacies are payable to the same persons, and it is obvious the estate is totally inadequate to pay the annuities and the legacies referred to likewise, this difficulty might, perhaps, be overcome, particularly with regard to the five hundred dollar legacies, which in case of deficiency are directed to be abated ratably.

But the objection first stated, appears to me, to be insuperable. It certainly could not have been the intention of the testatrix that these annuities should be paid out of the principal of her estate. The character of the bequest itself implies the contrary. It is of annuities to be paid for periods indefinite in their duration, and to persons in *esse*, and hereafter to come into existence. They are all equally the objects of the bounty of the testatrix, and to apply the principal of the estate to the payment of some of them whilst others would go unpaid altogether, would, in my judgment, be unjust, and in opposition to her plainly expressed intention.

The third exception of the trustee, T. Parkin Scott, Esq., which objects to this application, must be sustained.

T. P. SCOTT, for Exceptants.

G. L. DULANY, for Petitioners.

EDWIN S. TARR AND WM. H. BLASS

vs.

JOHN H. WILLIAMS
AND ANTOINETTE, HIS WIFE.

} DECEMBER TERM, 1853.

[CONTRACT OF FEME COVERT HAVING SEPARATE ESTATE.]

A MARRIED woman has no power over her separate estate but what is specially given, and to be exercised only in the mode prescribed, if the mode be prescribed.

[The marriage settlement referred to in the opinion of the Chancellor in this case, after reciting the intended marriage

between Antoinette McFadon and John H. Williams, conveys all the estate of the former, real, personal and mixed, to a trustee, *in trust* for the said Antoinette McFadon, her heirs, executors, administrators and assigns, until the said intended marriage shall be had and solemnized, and from and immediately after the solemnization thereof; *in trust*, to suffer and permit the said Antoinette McFadon, for and during the term of her natural life, to hold, use, occupy and enjoy the lands, estate and property hereby conveyed, and the rents, issues, profits and increase thereof, to receive and take, and the same to apply to her own sole and separate use, free from the power, disposal or control of the said John H. Williams, or any future husband of the said Antoinette, and without being in any manner liable or bound for, or by, his or their debts, contracts or engagements, for which rents, issues and profits and increase, the receipt of the said Antoinette alone, whether she be sole or covert, shall be a good and effectual acquittance and discharge; with power, nevertheless, to the said Antoinette at any time, her coverture notwithstanding, or whether sole or covert, to sell, dispose of and convey, absolutely, for such price or consideration as she may consider right, the whole or any part or parts of the trust estate hereby conveyed and assigned, and the proceeds of any sale to be made in the premises, by virtue of such power, to reinvest in such other lands, estate or property as she may think best, which reinvestment is to be considered and deemed in all respects in regard to the uses and trusts relating thereto, as the original property for which they may be substituted, with power also to the said Antoinette to make, execute, acknowledge and deliver any lease or leases of any part of the said trust estate, for any term or terms of years, renewable or not renewable, reserving the rent or rents, to be payable thereout for the same uses and purposes herein set forth as to the specific estate hereby conveyed. And from and after the decease of the said Antoinette McFadon, then *in trust*, to suffer and permit the said John H. Williams, in case he shall survive the said Antoinette, to hold, use, occupy and enjoy the lands, estate, effects and property aforesaid, and to receive the rents, issues

and increase thereof, for and during the term of his natural life, and from and after his death, *in trust* for such person or persons, and for such uses and purposes as she, the said Antoinette, shall by her last will and testament, or by any instrument of writing in the nature of, or purporting to be, her last will and testament direct, limit or appoint, and in case of no such direction, limitation or appointment, then *in trust* for all and every the children or child which the said Antoinette may have by the said J. H. Williams, their heirs, executors, administrators and assigns for ever, to take *per stripes*, and not *per capita*. But in the event of the death of the said Antoinette without leaving a child or children, or a descendant or descendants thereof, by the said J. H. Williams, living at the time of her decease, then *in trust* for such person or persons as would, by the now existing laws of the State of Maryland, be the heirs of the said Antoinette to take an estate in fee simple in lands by descent from her, and to, for or upon no other use, trust, intent or purpose whatsoever."

The other facts in the case are fully stated in the opinion of the Chancellor, delivered on the 16th of February, 1854.]

THE CHANCELLOR :

The object of the bill in this case is to charge the separate estate of Mrs. Williams, formerly Miss McFadon, with the payment of a bill for household furniture, amounting to upwards of five hundred and fifty dollars, for which, as the complainants allege, the defendants, Williams and wife, gave orders, and which was delivered to them, and is now in their use and possession, promising to pay therefor out of the separate estate of the wife. And it is further charged, that a portion of her real estate being about to be sold, she and her said husband, on the 26th of May, 1845, gave an order to the attorney, who had been employed by her to effect the sale, to pay said bill.

The order is in the following terms: "Walter Farnandis, Esq., will please pay to Messrs. Tarr & Blass, the amount of their claim out of the first proceeds of the sale of the real estate belonging to us, to be made under the proceedings now in pro-

gress for the division or sale of the real estate of John McFaddon, deceased." This order was signed by Williams and wife, and constitutes, as the complainants insist, an equitable mortgage on the property then intended to be sold, and forasmuch as the proceedings for the sale then in progress have been discontinued by direction of Mrs. Williams, they pray that said property may be sold by a decree of this court, and their claim paid out of the proceeds, and for general relief.

The defendants, Williams and wife, in their answer, whilst they admit that the furniture in question was purchased by the husband, expressly deny, "that the wife had any part in the making of said purchase, or had, in fact, any knowledge of the same, until after it was made, or that they, or either of them, did make to the said complainants any such statements and representations as are charged in the bill, or did obtain the credit or the purchase, or any part thereof, on the faith of such statements and representations." "But on the contrary, they aver that the furniture was sold and delivered by the complainants to the husband on his individual credit, was charged to him and the account therefor rendered to him alone, and that complainants received his individual promissory note therefor."

The answer admits that proceedings were contemplated at one time to sell certain property, a portion of the separate estate of the wife, and in the expectation that it would be sold, and the proportion coming to her would be more than sufficient to pay the complainants' claim. She, upon the application of her husband and of the complainants, did consent that it should be so paid, and did sign the order referred to in the bill. But that it was subsequently agreed that said property should not be sold, and that she has since exchanged her interest therein for another piece of property owned by one of her co-heirs. That she only intended that complainants' claim should be paid in the event of a sale of the property and her share of the proceeds thereof paid to her.

She denies that the furniture, or any part thereof, ever came into her separate possession and control, and avers, that long before the filing of the bill, (which was on the 5th of March,

1846,) a part thereof was taken and sold under an execution for the individual debts of her husband, and that the residue has been disposed of by him in payment of his individual debts, and she insists that inasmuch as the order on the attorney was given for the individual debt of her husband, and without consideration being received by her, she is not bound by it.

It appears, by an exhibit returned with one of the commissions, that the bill for this furniture was rendered against John H. Williams alone, and it is in evidence, from the letters of the complainants, returned under the same commission, that he gave his individual note for the money, which the complainants procured to be discounted at one of the banks in Baltimore. And in the whole series of letters from the complainants to the said Williams, from November, 1844, to February, 1845, nothing is to be found indicating an impression on the part of the complainants that Mrs. Williams was responsible to them for their claim.

Not only in the letters, between these dates, is there nothing from which it can be inferred that the complainants trusted Mrs. Williams, or looked to her separate estate for satisfaction, but it is manifest from their letters to Williams, of the 8th of March, 1845, that the credit was given to him, upon the faith of representations which he had made to them with regard to his property. That letter is in these terms:

“BALTIMORE, *5th March*, 1845.

TO J. H. WILLIAMS,

Sir—In reply to your letter, dated the 28th of February, I have to state, that if you do not forthwith pay your note, now due to Tarr & Blass, I will commence a criminal prosecution against you for swindling. You will well recollect that you came to our warerooms, and represented yourself to be the owner of a fine farm in Harford county, which you had recently purchased, and for which you had paid \$16,000, and that you had ample means to pay for all your purchases. It was under these representations of yours to me, that you obtained such credits. I shall wait four days, (until next Monday,) for your reply to this, after which period, in the absence of some satisfactory

settlement, I will surely proceed against you as above, and also in Chancery against your wife, as you represent her to have a separate estate.

Signed,

EDWIN S. TARR, *for Tarr & Blass.*”

Nothing in my judgment, could be more conclusive than this letter against the ground now taken by the plaintiff, that this furniture was sold upon the credit of Mrs. Williams’ separate estate, and upon an engagement that it should be paid out of it. On the contrary, the threat to proceed in Chancery against the wife is founded upon information derived from the husband that his wife had a separate estate, which did not otherwise appear to be known to the complainants. The letter states distinctly, that the credit was given to the husband upon representations made by him in reference to his own property, and for which they (the representations) being, I presume, ascertained to be false, he threatens him with a criminal prosecution. Unquestionably this is not the language these plaintiffs would have employed if the goods had been sold upon the credit of the separate estate of the wife as is now urged.

I feel, therefore, a strong conviction, that the account which the answer gives of this transaction is the true one, notwithstanding the proof of Elijah Walton, returned under one of the commissions. He is the only witness who says any thing in opposition to the answer, and he is not only not supported by corroborating circumstances, but the circumstance renders the truth of this answer almost, if not entirely, absolutely certain.

Being of opinion, then, that I may place the decree about to be pronounced, dismissing the bill upon the ground that its allegations are not merely unsupported by proof, but disproved by the pleadings and evidence, I am relieved from the necessity of considering the effect of the marriage settlement of the 11th of June, 1844.

But looking at the trusts of that instrument, it might, perhaps, be doubted whether Mrs. Williams had the power to charge the *capital* of her separate estate with the payment of the claim of the complainants. She has, no doubt, the power to receive and apply, at her pleasure, the rents, issues and profits thereof.

And she has the further power to sell and convey the trust property itself, and to reinvest the proceeds of sale of the estate itself in such other property as she might think best, the property thus purchased, being subject to the trusts of the property sold, but whether she could charge the trust estate with her husband's debts, or apply the principal in the purchase of property which would be consumed in the use, may be a question of some difficulty. If she could, it is clear the rights of those in remainder might be wholly defeated.

The conclusion at which I arrived, in considering this subject upon a former occasion, and which I regarded as the American doctrine, as established by the case of *The Methodist Church vs. Jacques*, 3 *Johns.*, *Ch. Rep.*, 78, and *Thomas vs. Folwell*, 2 *Wharton*, 11, was "that a married woman has no power over her separate estate, but what is specially given, and to be exercised only in the mode prescribed, if the mode be prescribed." This doctrine is vindicated by Chief Justice Gibson in the case in *Wharton* with great ability, and upon reference to the *Law Library*, vol. 65, page 370, *et seq.*, will be found to be the firmly settled conclusion of the American cases.

But the bill in this case will be dismissed upon the grounds first stated, without deciding or intending to decide that the rule above adverted to applies to this deed.

DOBBIN and TALBOTT, for the Complainants.

J. M. S. CAUSIN and W. FARNANDIS, for Defendants.

PATRICK GIBSON
 vs.
 JOS. W. FINLEY AND OTHERS. } DECEMBER TERM, 1853.

[EQUITABLE ASSIGNMENT.]

A DEBTOR residing in San Francisco sent, by letter, to his agent in Baltimore, two drafts on New York and one on Baltimore, with request to collect them, and pay the proceeds to certain creditors specified in the letter, with the respective sums due each, and also gave those creditors orders on his agent for the sums due them. One of these orders was payable out of the proceeds of the New York drafts, the others out of both the New York and Baltimore drafts, but none of them were accepted by the agent. The Baltimore draft being dishonored, the holder of the order on the New York drafts claimed the payment of it in full out of the proceeds thereof to the exclusion of the others. HELD—That the proceeds of the New York drafts should be paid, *pro rata*, among all the creditors mentioned in the letters.

It is the invariable effort of a court of equity to do equal justice to all by a ratable distribution of the fund under its control, when not prevented from so doing by the plain and explicit terms of the instrument with which it has to deal.

Where an order is drawn for the *whole* of a particular fund it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands.

But where the order is drawn, either on a general or particular fund, *for a part* only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he assent to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade in the course of business between the parties, as a part of their contract.

If a creditor is pursuing two remedies when only one is open to him, chancery may, upon application, compel him *to elect*, but until this is done, his pursuit of both will not deprive him of either.

[Jos. W. Finley, formerly of the city of Baltimore, but at the time of the filing of this bill, a resident of San Francisco, California, being indebted to various persons in the former city, transmitted in a letter, dated 31st of March, 1850, to Patrick Gibson, of Baltimore, three several drafts, two of which amounting to \$7000 were drawn upon bankers in the city of New York, and the other for \$5000 upon A. J. Bowie, of Baltimore. This letter, after specifying the drafts, requests Gibson to collect them and distribute the proceeds among certain creditors, a list

of whom is given, with the respective sums due them, amount-in all to \$11,964 36.

At the same time he forwarded to the several creditors, specified in the letter, orders, all dated 31st of March, 1850, upon Gibson for the respective amounts due each of them. The following is a copy of the order in favor of Rieman & Sons, one of said creditors.

“SAN FRANCISCO, 31st *March*, 1850.

P. GIBSON, Esq.

Pay to order of H. Rieman & Sons, out of proceeds of draft to your address, of A. M. Van Nostrand, on Ward & Price, (bankers,) New York, eleven hundred dollars, and oblige your ob't serv't,

JOS. W. FINLEY.”

The form of the orders to all the other creditors was to pay “out of any money collected from drafts on New York and Baltimore.”

The drafts on the bankers of New York were duly paid at maturity, that on Baltimore was dishonored and protested, and Gibson refusing to accept or pay any of these orders, filed his bill of interpleader against Finley and the several creditors, praying that they might be required to interplead and settle their rights as to the fund in his hands, the proceeds of the New York drafts, and for an injunction restraining them from suing or otherwise troubling him in relation thereto. The opinion of the Chancellor was delivered in this case on the 4th of March, 1854.]

THE CHANCELLOR:

But a single question of law is submitted in this case, and that arises upon a state of facts about which there is no dispute.

Upon a careful consideration of these facts, and the written arguments of the solicitors of the parties, I am of opinion, that the money received by the complainant upon the New York drafts should be distributed, *pro rata*, among the creditors mentioned in the letter of Joseph W. Finley to him, of the 31st of March, 1850.

Assuming that letter as one of instructions, which Mr. Gibson was required to obey, there would be no doubt of the right of the creditors enumerated in it, to participate equally and ratably in the money collected upon the drafts. That letter undoubtedly put them each and all upon an equality and to give a preference to any one over the rest in case of a deficiency, would not only contravene the plain intent and meaning of the writer, but would defeat the invariable effort of the court to do equal justice to all by a ratable distribution of the fund under its control, when not prevented from so doing by the plain and explicit terms of the instrument with which it has to deal.

The case of *Cross et al vs. Cohen*, 3 *Gill*, 257, illustrates very strongly the desire of chancery in administering funds under its control to give an equal portion to each creditor, and would be decisive of this case if the rights of the parties depended entirely upon the letter. But it appears that coterminously with the letter, Mr. Finley gave to each creditor mentioned in it an order on Mr. Gibson to pay the sum due him. The orders are all dated on the same day, 31st of March, 1850, and the only difference in them is that the one in favor of H. Rieman & Sons is payable only out of the proceeds of the drafts on the New York House, whilst those given to the other creditors are payable out of any money to be collected upon the drafts on New York and Baltimore. And the draft drawn on Baltimore having been dishonored and those on New York having been paid, but being inadequate to pay the claims of all the creditors, it is insisted on the part of Rieman & Sons, that they are entitled to a preference over the other creditors, that is, that their entire claim must be paid out of the proceeds of the drafts on New York, and the balance only distributed among the other creditors.

It is urged on their part that they have nothing to do with the letter from Finley to Gibson, that their right to payment rests upon the draft, which was sufficient to operate an equitable assignment of the fund in question, and that by force of it, they are entitled to be paid out of that fund to the exclusion of the other parties.

The order in favor of Rieman & Sons, it will be observed, was not drawn for the whole fund to be received on the New York drafts. It was payable out of the proceeds of those drafts, and, therefore, it is by no means clear that it did operate an equitable assignment of the fund, and after notice to the drawee, bind the fund in his hands. In the case of *Tiernan and others vs. Jackson*, 5 *Peters*, 597, in speaking of the effect of such assignments, the court observed, that in the case of *Mandeville vs. Welsh*, 5 *Wheat. Rep.*, 277, 286, it was said "that in cases where an order is drawn for the *whole* of a particular fund it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the fund in his hands. But where the order is drawn, either on a general or particular fund, *for a part* only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he consent to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade in the course of business between the parties as a part of their contract."

In this case there is no pretence that Mr. Gibson ever consented to the appropriation in favor of Messrs. Rieman & Sons, either by an acceptance of the draft held by them, or in any other way, and certainly no obligation to accept can be implied from the course of trade between them. On the contrary, the complainant, as shown by the whole record, has certainly refused to involve himself in any manner with the conflicting pretensions of these parties, or to come under any obligation to any one of them, leaving them to litigate and settle their rival claims among themselves.

But conceding that the order to Rieman & Son did amount in equity to an assignment, though it was only for a part of the fund, according to the view of *Mr. Justice Story*, in 2 *Com. on Eq.*, section 1044, still, in my opinion, they would only stand on a footing of equality with the other creditors.

If the order in favor of Rieman & Sons amounts to an assignment in equity, the orders in favor of the other parties have the same effect. They are all dated on the same day, and the only

difference is that the former is payable exclusively out of the proceeds of the New York drafts, whilst the latter are payable out of them and the Baltimore draft, and I can see no reason why the dishonor of the last should place the holders of the drafts, other than Rieman & Sons, upon more unfavorable ground than they occupy with respect to the drafts on New York which were paid.

In this view of the case they are all assignees in equity of the fund received by Mr. Gibson on the New York drafts. It is true, the other creditors hold another security, but that, without their default, has turned out to be worthless. But why should this weaken their claim against the New York fund or postpone them to a creditor whose claim against, or lien upon, the fund is contemporaneous in time and created by an instrument similar to those held by them?

It is urged by the solicitor for Rieman & Sons, that the preference claimed by them is equitable, because, if the Baltimore draft had been paid, and those on New York dishonored, they would have been entirely excluded. This may be so, and probably looking alone to the orders themselves and throwing out of view the letter of instructions, is so. But why so? Simply because their order was payable out of that particular fund, and that only, whilst those held by the other parties out of that same fund and another likewise. The additional security of the Baltimore fund could not impair their claim to be paid out of the New York fund if the former proved unavailing.

The solicitor for some of the creditors goes further and says, that Rieman & Sons, by issuing an attachment from the Superior Court of Baltimore city against Finley as a non-resident debtor, have forfeited their right to any portion of the fund in question. That it amounts to a renunciation of their claim under the order and letter of instructions of the 31st of March, 1850.

It might be a sufficient answer to this view to say, that there is no evidence before the court of the attachment, or for what it issued, if it did issue. But if there was, it would not, as I think, deprive the creditor of his right to participate in the

fund. If a creditor is pursuing two remedies when only one is open to him, chancery may, upon application, compel him *to elect*, but until this is done, his pursuit of both will not deprive him of either. Here these parties have certainly not been called upon to elect, and the circumstances (even if the proof existed) that they are proceeding by way of attachment would not deprive them of the right to come in under this bill of interpleader and ask for their share of the fund.

[An order was then passed directing the division of the fund, *pro rata*, amongst the creditors specified in the letter of Finley of the 31st of March, 1850.]

JOHN NELSON, for Rieman & Sons.

WALLIS, THOMAS and NORRIS, for other Creditors.

WILLIAM J. HYDE vs. JOHN AND HAMILTON EASTER	}	SEPTEMBER TERM, 1847.
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[PARTNERSHIP—PARTNERS.]

THE rule that the carrying the stock of an old firm into the business of a new one, entitles a partner of the old firm to treat the new trade as a continuation of the old business, and to claim such proportion of the profits as he might have claimed if the old trade had been continued, is not a universal one. The right to share in the profits resulting from a continuation of the business after dissolution, is founded upon the exposure of the property of the partner who goes out to the risk of the new business, and if such partner has no property to be thus exposed, the principle cannot apply.

This rule is not applicable to the present case, where the *whole capital* was furnished by the continuing partners, and the out-going partner had at the time of dissolution drawn more than his share of the profits, and the written articles of co-partnership provided for its termination in various contingencies in precise terms, and the partnership was in fact dissolved in exact conformity with the articles.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

It appears in this case that on the 1st day of February, 1842, the complainant and the defendants entered into written articles of copartnership, for the purpose of carrying on the dry goods business, in the city of Baltimore, for the space of four years, under the name and style of Wm. J. Hyde & Easter, unless sooner dissolved in the mode stipulated in the contract.

The capital was to be furnished by the defendants, and the management of the business subject to their advice and counsel, was confided to the plaintiff, who was to devote his time and attention exclusively thereto; and by one of the stipulations it was agreed between the parties that "the privilege should be and was reserved to the defendants, that if during the continuance of the copartnership they should, in their judgment, think that the said William J. Hyde is not conducting the business of the firm in a manner so as to redound to their advantage, the right is reserved to them of entering the premises and taking possession of the stock of goods on hand, the books and effects of the firm, and declaring the partnership dissolved; and after the payment of all the liabilities of the firm, paying to the said William J. Hyde, in merchandise, at the cost thereof, any portions of the profits that may have accrued to him."

There were other stipulations looking to a termination of the partnership from different causes, which it is not deemed necessary to notice, and then it was agreed that the profits upon the dissolution should be divided in the proportion of one-third to each party.

It further appears, that the parties commenced and carried on business according to the terms of these articles, the capital being furnished by the defendants, and the labor and necessary attention by the plaintiff, until the 31st of January, in the year 1843, when the partnership was, by the defendants, declared to be dissolved, and the stock in trade, books and other effects of the firm, were taken possession of by them.

Afterwards, on the 1st of February following, the plaintiff filed his bill in this court, in which, after setting forth the articles of copartnership and averring the due and faithful per-

formance of all the stipulations on his part to be performed, and the realization of large profits by his good management of the business of the firm, he alleged that the defendants had, in the manner stated, declared the copartnership to be terminated, and were removing the stock and property of the firm to some other place, where they were carrying on a business in which the complainant had no interest.

Upon this bill, which contained many other averments of misconduct on the part of the defendants, and which prayed in a certain event, that the affairs of the firm might be wound up under the directions of the court, and the property distributed according to the rights of the parties, the Chancellor, according to one of its prayers, granted an injunction. Afterwards, the answer of the defendants being filed denying the misconduct imputed to them, an appeal from the order granting the injunction was prayed and the order reversed with costs, by the Court of Appeals, at June term, 1843, and the cause remanded to the Court of Chancery for further proceedings.

It was then, by an order passed on the 1st of May, 1845, referred to the Auditor to state an account between the parties, from the pleadings and proofs then in the cause and such other proofs as should, within a limited time, be laid before him. This duty the Auditor has performed, stating and reporting sundry accounts, to which the parties have filed exceptions, and these having been argued by their solicitors, in writing, are submitted for decision.

It appears by a settlement of the affairs of this concern on the 31st of January, 1843, when the partnership was dissolved, as before stated, that there was of merchandise on hand, the sum of \$34,985 19, and other assets amounting with the merchandise to the sum of \$67,988 44, from which deducting the liabilities of the firm, there remained a balance of \$4685 94, which, according to the articles of copartnership, was to be divided in the proportion of one-third to each partner, and gives to each the sum of \$1561 98. It appears further by the same settlement, however, that the complainant had drawn from the firm, and was at that time indebted to it in the sum of \$1697 83. Exceeding by \$135 85 his proportion of the profits.

We have seen that according to the articles of co-partnership, the proportion of profits due the complainant, after the payment of the liabilities of the firm, was to have been paid him in merchandise at the cost thereof, and, consequently, assuming that the merchandise mentioned in the balance-sheet, or settlement, on the 31st of January, 1843, are properly valued, and no attempt has been made to show the contrary, the complainant instead of being a creditor is a debtor to the firm.

It appears, however, that upon the dissolution of the partnership, the defendants took possession of the merchandise and other assets of the old firm, of which the plaintiff was a member, and carried the merchandise into a new firm, styled Hamilton Easter & Company, at the prices at which it was put down in the settlement, mixed it with new stock, purchased from time to time, and sold it indiscriminately with such new stock, and that from such sales made from day to day profits to some extent were realized, and it is supposed, and the Auditor has proceeded upon that hypothesis, that of these profits the complainant is entitled to a proportionate share.

The evidence, it may not be amiss to remark, shows that it is far more probable that a loss was sustained by the defendants in the sales of this stock of goods than that profits were realized, and we are instructed in the same way that of the debts due to the firm, and which, in the settlement, were all assumed to be solvent, many were wholly insolvent. The presumption, therefore, is very strong, not to say irresistible, that if the merchandise on hand at the time this partnership was dissolved, had been at once pressed upon the market and sold, and the other assets converted into cash, the balance due from the plaintiff would have been materially increased.

It is said, however, that as the defendants did not pursue this course, but carried the stock of the old into the business of the new firm, exposing it to all the perils of such new adventure, the complainant is entitled to treat the new trade as a continuation of the old business, and to claim such proportion of the profits of the former as he might have claimed if the old trade had been continued, and this is said to be the equitable rule in such cases.

In this case it will be recollected, that the whole capital was furnished by the defendants, and, therefore, so far as capital is concerned, the dangers incident to the new trade to which the old stock was exposed, are dangers in which the complainant had no concern, especially when we reflect that it appears by the balance-sheet or settlement, made on the day of the dissolution of the partnership, that he had overdrawn his share of the profits up to that period. Having supplied no part of the capital, and having overdrawn his share of the profits, his proportion of the risk of the new trade would seem to be very considerable.

That the rule contended for by the complainant's solicitor is not a universal one, is shown by a remark of *Lord Eldon* in the case of *Brown vs. De Tastett*, 2 *Russell*, 347, in which the doctrine supposed to be established in *Crawshay vs. Collins*, page 325 of the same book, was brought in review and considered productive of great hardship. The *Lord Chancellor* observed in reply to the remarks of the counsel upon the case of *Crawshay vs. Collins*, "that he did not mean to say that in all cases of a partnership the consequence of carrying on the business would be that the profits should be divided, as if the parties had not died or become bankrupt, but that such might be the law in some cases." "The general principle ought to be this, that as it is quite competent to the parties to settle the accounts, and to mark out the relation between themselves as debtor and creditor, so where there is a non-settlement of the account, (though a settlement may sometimes introduce great hardships and difficulties,) yet those who choose to employ the property of another for the purposes of their trade, exposing it to all the risks of insolvency and bankruptcy, have no right to say that the account shall not be taken, if it can be taken without incurring difficulties which might embarrass the house to such an extent as to make it unjust to demand it."

It would seem, therefore, that the right to share in the profits resulting from a continuation of the business after the dissolution of the partnership is founded upon the exposure of the property of the partner who goes out to the risks of the new

business, and that if the partner going out has no property to be thus exposed, the principle cannot apply. *Collyer on Part.*, 181, 182. The case of *Crawshay vs. Collins*, 2 *Russell*, 325, cited by the counsel for the plaintiff was a case in which the bankrupt partner, (whose assignees were allowed to participate in the profits made by the continuing partners subsequently to the bankruptcy,) was entitled not only to a share of the profits during the continuance of the partnerships, but to a proportion of the *capital* also. In deciding that case, *Lord Eldon* said, "the continuing partner has made profits by the use of the funds which belonged to the partnership itself, and although he added other funds of his own, yet as he put the partnership fund in hazard, the addition of his own funds should not bring to him and take away from others all the profits which have arisen from the property of the original partnership, which was in truth the foundation of the concern." He further observed that his opinion was founded upon the particular circumstances of that case, and was not to be regarded as laying down a principle for the decision of other cases.

Besides, the partnership in the case of *Crawshay vs. Collins*, was founded upon a parol agreement for an indefinite period, and of course contained no provision for its dissolution. It was, in fact, terminated by the bankruptcy of one of the partners, after which the business was carried on by the others, and profits made, in part, at least, out of the pre-existing capital, and the Lord Chancellor dwelt upon this circumstance, and upon the importance that all partnerships should subsist upon written articles, "and that they should lay down a clear rule in what way the interests of the partners in the different events that may occur are to be disposed of." The Chancellor also made the additional observation, which was, that "the rule which is to be applied must be deduced in almost every case from the particular circumstances of that very case."

Now, looking to the circumstances of this case, to the fact that the whole capital was furnished by the defendants; that the complainant, (estimating the stock on hand at prices above those it probably sold for, and assuming the debts due the firm

to be good, when the proof shows that many of them were bad,) had drawn out more than his share of the profits, seeing that the articles of copartnership provided for its termination in various contingencies, in precise terms, and that it was brought to a close in exact conformity with the articles. I cannot bring myself to think that this is a case to which the principle contended for by the complainant's solicitor is applicable, and shall, therefore, consider it my duty to dismiss the bill, for without the aid of this principle, it seems impossible to regard him as the creditor of the defendants.

That the defendants had a clear legal right to terminate the partnership, and take possession of the property in the mode charged in the bill, is manifest from the decree of the Court of Appeals, which, without regard to the answer, dissolved the injunction, that, of course, deciding that even upon the bill the complainant had no title to interfere in that way.

THOMAS S. ALEXANDER, for Complainant.
JOHN NELSON, for Defendant.

WILLIAM H. KEIGHTLER ET AL	}	DECEMBER TERM, 1853.
VS.		
JACOB C. NICHOLSON ET AL.		

[ASSIGNMENT IN FAVOR OF CREDITORS—SEQUESTRATION—JURISDICTION.]

AN assignment in favor of creditors, though in other respects free from objection, must convey all the property of the grantor, and the *onus*, in this regard, is upon the party who sets up the deed.

A deed in favor of creditors, of specific articles of property, and which does not, by express terms, purport to convey all the property of the grantor, is not, on *that account*, absolutely void, but upon proof that the grantor had no other property, will stand, if its other provisions are legal.

The adjudicated cases in this state have not decided that an assignment in favor of creditors, which provides that the dividends of the non-assenting shall be divided proportionably among the assenting creditors is void.

It would be irregular to decide upon the validity of such a deed upon the return

of a writ of sequestration, to enforce a decree, when no such question was presented in the case in which the decree was obtained.

Where a *chose in action* is in the hands of a third party, who is willing to abide by the order of the court, or who admits it to belong to the person against whom the writ of sequestration has issued, the court will consider it liable to sequestration, and will order it to be paid into court.

But where the amount or title of the party whose property is sequestered, is disputed by the person holding the *chose in action*, the court cannot make an order upon him ; it is only in a *clear and simple case* that a sequestration can be enforced by order.

A writ of sequestration was laid in the hands of a party who denied that the money belonged to the party against whom the writ issued, and set up a deed from such party, conveying the *choses in action* to him in trust, and his proceedings in the Superior Court of Baltimore city for the administration of the trust. HELD—

That under these circumstances, it would be wrong in this court to authorize the institution of proceedings at law or in equity to enforce the sequestration.

If the Superior Court had jurisdiction over the subject matter of the trust, however irregular the proceedings may have been, they cannot be regarded as *coram non judice* and void, nor can the irregularities be revised by this court.

The decision of a court of competent jurisdiction, when coming incidentally in question or offered as evidence of title in another court, is conclusive of the question decided, no matter how irregular or informal the proceedings may be, or what mistakes or errors the court may make in the matter adjudicated.

[The facts of this case are fully stated in the opinion of the Chancellor, delivered on the 9th of March, 1854.]

THE CHANCELLOR :

The complainants in this case, obtained on the 13th of May, 1851, a decree against Royston Betts for a large sum of money, and on the 6th of September following, they filed their petition in which, as to such portions of said decree as by the terms thereof were then due and unpaid, they prayed that writs of sequestration might issue to the sheriffs of Baltimore city and Alleghany county, to sequester the property and effects of the defendant in their respective bailiwicks.

The writs were ordered on the same day, and that directed to the sheriff of Baltimore city was returned, laid on the 16th of September, 1851, in the hands of the agents of several insurance companies, and also in the hands of William J. Ward, Esq. Subsequently, on the 22d of April, 1853, the complainants filed

another petition in the cause in which, after reciting the issuing of the writ, and the proceedings upon the first petition, they allege that at the date of the service of the former writ of sequestration, Ward and the corporations had moneys in their hands of said Betts, which should have been applied in satisfaction of their decree, and that since the return of the writ, the corporations had paid all moneys in their hands of said Betts to said Ward, and that the latter was about to apply the same to other purposes upon the ground that as the moneys were not in his hands at the date of the service of the writ, he was at liberty to do so ; whilst the petitioners insist that as said moneys were in the hands of said corporations at that time, and were paid to Ward, with notice of service, they are bound in his hands as fully as they would have been in the hands of the corporations. And then, in order, as the complainants say, to conclude all questions on the subject, they pray for another writ of sequestration, and further that said Ward may be required to set forth what moneys and effects of said Betts are in his hands, and how and when received, and that he may be required to bring the same into court to be applied in satisfaction of the decree.

The writ was ordered to be issued on the same day, and by the same order, Mr. Ward was required to answer the petition by a day named. The writ issued and was laid in the hands of Ward on the 27th of the same month and year, and on the 17th of May following, he filed his answer.

In this answer, after admitting the decree, he submits a copy of a deed of trust, executed by said Betts to him, and a copy of his report, as trustee, made to the Superior Court of Baltimore city, and of the order of said court, and notice to creditors, in pursuance thereof, and then proceeds as follows : "That respondent had supposed, and yet believes, that the original writ of sequestration was issued after the execution and perfecting of the deed of trust to him." "And he submits, such being the case, the course adopted by him, as trustee, preparatory to distribution, in pursuance of the provisions of the deed, was right and proper, and that such distribution ought to be made," and he then asked to be heard in the premises before the court should finally act.

In this report referred to, which was filed in the Superior Court on the 6th of January, 1853, the amount of money in the hands of the respondent is stated, and the sources from which derived, and the charges to which the trustee supposed it to be subject, and it concludes with expressing a desire that the trust should be administered under the supervision of the said court, and prays that notice to the creditors of Betts may be given preparatory to a distribution. Upon this report the Superior Court passed an order directing notice to be given accordingly to the creditors, on or before a day therein limited.

The deed from Betts to Ward referred to, and filed with his answer, bears date the 29th of January, 1851, and conveys to Ward, in trust, four policies of insurance, and the moneys to be recovered upon them. The deed recites that suits were then depending upon them in the Circuit Court of the United States for the Maryland district, and the trusts are :

1st, that the trustee shall apply the money, when received, to the payment of necessary expenses, including counsel fees, as agreed with the attorneys. 2nd, to the payment of commissions to the trustee. 3rd, to the payment of \$3,000, with interest from the 2d of December, then last past, to Richardson, Watson & Co., of New York, and the residue to divide, without preference, among all the other creditors of said Betts who may come in and release, as hereinafter stated, according to their respective claims, provided that each of said creditors receiving a dividend under the deed should, at the time of receipt, execute and deliver to said Betts a sufficient release in full of his demand, and in case of refusal of any of said creditors so to release the distributive share of the party so refusing, to be divided proportionably among the assenting creditors.

Shortly before, and during the argument, Mr. Ward moved to quash the sequestration, so far as it related to him, upon the ground, among others, that he has no property or effects of said Betts in his hands, bound by the writ, and had none such when it was issued to which Betts had any claim. And the first question presented is, whether the deed from Betts to Ward, before mentioned, is so utterly and absolutely void as to subject the

property assigned by it to the trustee, to the claims of the complainants under the proceedings in this case.

The deed is of certain specific parcels of property, being four policies of insurance, and the moneys demandable under them. It does not upon its face purport to convey the whole of the property of the grantor, nor does it profess to be only of a part. These policies may or may not have constituted all his property, and therefore assuming that deeds of this character are void unless they embrace all the property of the debtor, there is nothing upon the face of this instrument which, by construction of law absolutely condemns it. Looking to the cases of *Green and Trammell vs. Trieber*, 3 *Md. Rep.*, 11, and *Sangston vs. Gaither*, *ib.*, 40, it can no longer be a question in this state, that a deed made by a debtor for the benefit of his creditors requiring releases, even though in other respects free from objection, must convey all the property of the debtor, and a reference to the case last referred to, will show that the *onus* in this regard is upon the party who sets up the deed.

The deed in *Sangston vs. Gaither*, like that in this case, was of certain specified property. It was not apparent upon its face whether it did or did not convey the whole of the grantor's property, and the court say, that question is left in doubt by the case stated, and I think it is quite manifest that if it could have been shown, *dehors*, the deed that the property conveyed by it constituted the whole estate of the grantor, and there had been nothing objectionable in its trusts, it would have been maintained as a valid instrument. But the deed in *Sangston vs. Gaither* was pronounced to be void, not merely or principally because it was not shown to embrace the whole property of the grantor, but because of its reservations for the use and benefit of the grantor himself.

It, therefore, appears to me that though the deed in this case is of specific articles of property, and does not, by its express terms, purport to convey all the property of Betts, it is not on that account absolutely void, but upon proof that the grantor had no other property, it would stand if its other provisions are legal.

Now, with reference to the trusts of this deed, the adjudicated cases in this state do not apply. It does not provide that the dividends which would otherwise belong to the creditors who should come in and release, shall, on their refusal, be paid back to the debtor, or enure to his benefit, but that such dividends shall be divided proportionably among the assenting creditors, and in this respect differs from the decided cases in this state. It might, therefore, be unsafe to say that the trusts of this assignment absolutely condemn it, and I apprehend it would be irregular to pronounce judgment upon it in this case, and under the proceedings by which the question is presented.

The petition asking for the sequestration makes no mention of the deed, and, of course, does not assail it as fraudulent against creditors. It appears for the first time in the cause with the answer of Mr. Ward, who introduces it as evidence of his right to receive and disburse the money collected from the insurance companies, and as the foundation of his proceeding in the Superior Court. No issue has been made upon the deed; no opportunity given to the parties claiming under it to remove by proof, if they can, the objection that it is but a partial conveyance of the grantor's property. But this important question, involving matters of fact and of law, must be decided (if at all) upon the return of a writ of sequestration, thus making process issued in execution of the decree of this court the foundation of a totally new, and perhaps doubtful controversy. It appears to me it would be irregular and most inconvenient thus to engraft upon one cause a new litigation involving the rights of other parties, and presenting questions entirely distinct from those which arose in the first suit.

But apart from the question touching the validity of the conveyance, the trustee has interposed a motion to quash the writ of sequestration, upon the ground that he has not now, nor had he at the time it issued any property or effects in his hands which could be reached by it, and it is insisted by his counsel that the process of sequestration is inapplicable to such a case as this.

It was said by the late Chancellor in *Watkins vs. Dorsett*, 1

Bland, 533, that according to the English practice, *choses in action* are not liable to creditors, and that they cannot be taken on a *feri facias*, or under a *sequestration* from chancery, or be at all touched in equity for the benefit of creditors, and most of the cases which have been referred to in the argument before me are cited by him in support of his opinion.

But I apprehend the rule laid down in that case must be taken with some qualification, for when the *chose in action* is in the hands of a third party, who is willing to abide by the order of the court, or who admits it to belong to the person against whom the sequestration has issued, the court will consider it liable to sequestration, and will order it to be paid into court. This is stated to be the practice in 2 *Daniel's, Ch. Pr.*, 1261, after an examination of the cases; but when the amount or the title of the party whose property is sequestered, is disputed by the person holding the *chose in action*, the same author states it to be clear from the cases that the court cannot make an order upon him, and the only question is when the party in possession of the *chose* refuses to admit or dispute his liability, whether the court will authorize the institution of proceedings at law or in equity, for the purpose of enforcing the sequestration. This point is said still to remain undecided. 2 *Daniel's, Ch. Pr.*, 1262.

In *Hoffman's Ch. Pr.*, 157, 158, it is said to result from all the cases, that if the party indebted, or holding the *chose in action* resists, no order can be made upon him. And in *Grew et al vs. Breed et al*, 12 *Metcalf*, 363, the language of *Lord Langsdale* in 1 *Beavan*, 269, is quoted with approbation, in which he says, "that it is only *in a clear and simple case* that a sequestration can be enforced by order, and that in other cases it may be necessary to resort to an action or suit under the direction of the court."

In the case before this court it is very clear that Mr. Ward does not admit that the money in his hands belongs to the person against whom the sequestration issued, nor is he willing to abide by the order of this court. On the contrary, he presents the deed of *Betts* to him, in trust, for purposes which he sup-

poses to be valid, and sets up his proceedings in the Superior Court for Baltimore city, for the administration of his trust under the direction of that court, and insists in his answer that such proceedings were right and proper, and that the funds in his hands should be distributed under its order.

I take it, therefore, to be clear, that I have no power to make an order upon him to bring in or pay over this money in satisfaction of the decree in favor of these plaintiffs, he being an unwilling party, resisting the application, and setting up a conflicting title; and the only question is, whether, under the circumstances of the case, it would be proper in the court to authorize the institution of proceedings at law or in equity to enforce the sequestration?

The practice in this respect is not, perhaps, altogether free from doubt, (2 *Daniel*, 1262,) but conceding it to be otherwise, I still think that in this case it would be wrong to enforce it.

It has already been stated that Mr. Ward, the grantee in the deed from Royston Betts, filed a report in the Superior Court of Baltimore city on the 6th of January, 1853, asking that the trust reposed in him might be administered under its direction, and that the creditors of Betts should be notified to produce their claims preparatory to a distribution of the trust fund, and that upon this application the court passed an order calling them in by a day named for that purpose. There can be no doubt, therefore, that the Superior Court, by passing this order, undertook to direct the administration of the trust, and that it will proceed to do so unless restrained by some tribunal having authority to interpose.

It is supposed that in making this application, the trustee considered himself acting in obedience to the provisions of the act of 1845, ch. 166, but it is insisted on the part of the complainants, that this act does not embrace a deed of this description to which recording is not necessary.

I do not consider it very essential to inquire whether this deed does fall within the spirit and intent of the statute, though in view of its object, I think it would be proper to give it a construction large enough to embrace it. But whether this be so or not, there can be no doubt that a trustee appointed by a

deed like that in question, may seek the protection and direction of the court, and that it has jurisdiction to protect him in the performance of his duties. This power of the court does not depend upon, nor is it derived from the act of Assembly referred to, but falls within the general scope of its authority over trusts.

Now, whether the mode adopted by Mr. Ward in invoking the aid of the Superior Court was the appropriate one or not, is not the question. The question is, had the court jurisdiction over the subject matter? for if it had, however irregular the proceeding was, it could not be regarded as *coram non judice* and void, nor could the irregularities be revised by this court. *Bowie vs. Jones*, 1 *Gill*, 208. The decision of a court of competent jurisdiction, when coming incidentally in question, or offered as evidence of title in another court, is conclusive of the question decided, no matter how irregular or informal the proceeding may be, or what mistakes or errors the court may make in the matter adjudicated. 2 *G. and J.*, 50.

The proceeding of the trustee in this case is said to be founded upon the peculiar practice of the Baltimore court. Be this as it may, and considering the proceeding wholly irregular, yet still, in view of the unquestionable right of the trustee to call upon that court to aid and protect him in the performance of his trust, and in view, likewise, of the undoubted jurisdiction of the court over the subject matter, it seems to me impossible to say that the proceeding is an absolute nullity and void. The object of Mr. Ward in applying to the court was to bring in all the creditors having a right to participate in the trust fund, and the order of the court directing notice to be given, was to bring them in accordingly. Now, if that court proceeds to distribute the money among the creditors, or the trustee does so under its authority and by its directions, can it be successfully contended that he would not be protected? I think not. I cannot, therefore, regard the proceeding in the Superior Court as void, and hence it appears to me it would not be proper in this court to authorize the institution of a suit at law or in equity for the purpose of enforcing the sequestration issued from this court. It might bring on a collision between the two courts,

when the authority of this court to issue and enforce the sequestration is certainly not free from doubt, whilst the jurisdiction of the Superior Court, in my opinion, cannot well be questioned.

Under these circumstances, this return to the sequestration, so far as the same relates to or affects the said William J. Ward, must be quashed, but no costs will be allowed.

ALEXANDER, for Complainants.

TALBOTT and R. JOHNSON, for Defendants.

RICHARD L. SMALLWOOD

VS.

PETER D. HATTON.

}

SEPTEMBER TERM, 1853.

[LOCATION OF BOND OF CONVEYANCE.]

A PARTY contracted to purchase for a gross sum, a tract of land containing one hundred acres, "be the same more or less." **HELD**—that these words so far qualified the representation of quantity as to preclude either party from any just claim to relief on account of deficiency or surplus, unless it be of such a character as to induce the belief of fraud or mistake.

The home line of tract of land as described in a bond of conveyance was, "*thence down said branch to the beginning.*" **HELD**—that this line must be run with the meanders of the branch, and not in a *straight* line to the beginning.

An order referring the cause to the Auditor, with directions to report the annual loss sustained by the plaintiff for the land claimed by him as embraced within the true location of his bond of conveyance and withheld by the defendant, is not a final adjudication that he is entitled to such land; it does not so settle the rights of the parties that an appeal would lie from it.

[The original bill in his case was filed by the complainant, Smallwood, on the equity side of Charles County Court, on the 30th of August, 1837. It alleges that a judgment was rendered against him at August term, 1836, of said County Court, in favor of the defendant, Hatton, for \$350 and costs, a short copy of which is filed as an exhibit. That the cause of action on which the same was rendered, was a single bill given by him

in part payment of the purchase money, for a certain piece or parcel of land, called Friendship, which he had purchased of said Hatton, on the 26th of March, 1825, and took from him a bond of that date, to convey the same, which is also filed with the bill. That in virtue of this contract he took possession of part of the land mentioned in the bond, but that Hatton has always refused and prohibited him from using or occupying a part thereof, much the most fertile and valuable, contained between the last or given line and Piney Branch mentioned in the bond, which said Hatton has used and possessed himself. That complainant has repeatedly called on said Hatton to complete the contract and give him a good title to the land, which he has failed and refused to do. That \$800 of the purchase money has been paid, and he is informed and believes that at no time before or since the contract, has Hatton been competent to make a good and sufficient title to him for this land, but that his title is incomplete, and that there are liens outstanding against it; that he has failed, when called on, to perfect the title and to give a good title to complainant. The bill further charges that a *fi. fa.* has been issued on said judgment, which is outstanding and may be levied on complainant's property, and then prays for an injunction restraining further proceedings thereon, until the title to the land can be made to complainant and he put in possession of the *whole* land according to the contract, and for a decree for an allowance for the part which has not been delivered to him, and for further relief.

Exhibit A., filed with this bill, was a short copy of the judgment against Smallwood, and was in favor of "Peter D. Hatton, use of Eleanor B. Hatton, administratrix of Nathaniel Hatton." Exhibit B., was the bond of conveyance for the land, signed by Hatton, and dated the 26th of March, 1825, in the penalty of \$3000, conditioned for the conveyance to Smallwood of the land therein described. The description of the land in this bond is fully stated in the opinion of the Chancellor. The injunction was granted as prayed. The land as run out by the surveyor, by making the home line a straight line, contained 96 acres and 21 perches, but by running the said line with the

meanders of Piney Branch, there would be 14 acres 1 rood and 21 perches less.

The answer of Hatton to this bill was filed on the 17th of March, 1840, in which he admits the recovery of the judgment, and that the cause of action was a single bill for the purchase money for land which complainant purchased of respondent, and that two notes were given to secure the payment of said purchase money, and that he gave a bond of conveyance as charged in the bill. But he denies that complainant took possession of a part only of said tract of land, but he avers that he entered into and took possession of the whole thereof, and cultivated and used the same without any let or hindrance from defendant or any other person; he denies that he or any other person under his authority has used or possessed any part of said tract of land since the sale thereof to the complainant; he denies that complainant ever called upon him to complete the contract, or to give him a good title to the land, or asked of defendant a deed for the same. On the contrary, he avers that he has always been willing and ready to give complainant a good and valid deed therefor.

Commissions to take testimony were then issued, and proof taken and returned, and on the 19th of June, of 1844, Charles County Court, as a court of equity, passed an order referring the cause to the Auditor, "with directions to report the amount of the loss sustained annually by the complainant, by the withholding the use of the land lying west from the meanders of Piney Branch, and a straight line as laid down on the plat by the defendant, from the time when he threatened to sue the plaintiff if he cut wood thereon, and to take such testimony as may be offered by either party in relation thereto, and also to report the balance due on the original purchase."

The cause was afterwards, on the 27th of August, 1845, removed to the Court of Chancery upon the suggestion of the defendant, and no further proceedings were had therein until the 18th of October, 1852, when a petition was filed by Eleanor B. Hatton, which, together with all the subsequent proceedings, is fully stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

The main point in controversy in this case depends upon the true construction of the bond of conveyance, executed by Hatton to the complainant, on the 26th of March, 1825, for it must be conceded that parol proof cannot be allowed upon the pleadings to contradict or vary the terms of the agreement embodied in that instrument. The complainant is entitled to the land, and no more than the land which the proper location of the bond will give him.

He contracted to pay for it the round sum of fifteen hundred dollars, and though it is described as containing one hundred acres, the words "be the same more or less," must so far qualify the representation of quantity as to preclude either party from any just claim to relief on account of a deficiency or surplus. This case is stronger against the complainant's title to relief than that of *Jones vs. Plater*, 2 *Gill*, 125, because in the latter the land was to be paid for by the acre, and yet the representation of quantity being qualified by the words "more or less," the number of acres was not regarded as of the essence of the contract, and a deficiency, unless of such a character as to induce belief of fraud or mistake, furnished no ground for relief.

In this case to be sure the deficiency is much larger, but the land was not sold by the acre but for a sum *in solido*, and the circumstances are not such as to excite a suspicion of fraud. The proof shows that as early as the year 1826, the complainant had been warned not to cut wood upon or cultivate the land lying between Piney Branch and the straight line from B. to A., as located upon the plat, and that for many years it was in the possession and use of a third person, claiming under Hatton, and no complaint appears to have been made by the complainant, or any attempt to vindicate his title to that strip of land, until the year 1837, when he filed his bill in this case to stay execution on a judgment rendered against him for a portion of the purchase money at August term, 1836, of Charles County Court.

The plaintiff then having acquiesced for upwards of ten years in the defendant's construction of this contract, cannot now be

permitted to say he was defrauded. In point of fact he does not allege fraud in his bill, but insists that according to the true construction of this contract his purchase embraced the piece of land in question. The language of the bill is, that "the said Hatton has always refused and prohibited your orator from possessing, using or occupying a part of said land, much the most fertile and valuable, contained between the last given line and Piney Branch mentioned in said contract, but which he has used and possessed himself."

It is, therefore, simply a question of construction and location, and that of course depends upon the terms of the bond of conveyance. These terms are,

"That if the above bound Peter D. Hatton, his heirs or assigns, shall well and truly make to the said Richard L. Smallwood, his heirs or assigns, a good and sufficient *warranty* deed, to a certain tract or parcel of land lying in Charles county, and called by the name of Friendship, beginning from Piney Branch, where the road crosses to George Boswell's mill, thence with said road to the first branch of Mattawoman Swamp, thence up said branch to a ditch leading from the outer line of Friendship to Mattawoman, thence up the said ditch to the line of Friendship, thence with the said line to Piney Branch, thence down said branch to the beginning, containing one hundred acres of land, be the same more or less." And the sole question upon this part of the case is whether this last line described as running "thence down said branch to the beginning," shall pursue the meanderings of the branch or shall be a straight line to the beginning on Piney Branch.

A question, not unlike the present, came up in the Court of Appeals, in the case of *Thomas' Lessee vs. Godfrey et al*, 3 *Gill & Johns.*, 142. There the third line of the patent had a call to the main falls of the Patapsco, and from that point the description was "with the main falls by a *direct line* to the first bound tree." And the question was whether this last line should be run with the meanders of the stream or directly from the termination of the third line on the falls to the beginning tree. Upon this question the judgment of the court was, that the ex-

pressions "with the main falls" were so qualified by the other expressions, "*by a direct line*," as to show that the latter were intended as the controlling expressions, and consequently that the given line should be run directly from the place of departure to the beginning tree, the object imperatively called for, and that by the words "with the main falls," the general course of the stream was meant, the meanders of which could not be pursued by a single direct line. But it is manifest from the reasoning of the court, that the survey would have been closed by pursuing the meanders of the stream but for the introduction of the words "*by a direct line*," which demonstrated that the meanders of the stream were not intended.

The expressions in this bond of conveyance are "thence with the said line to Piney Branch, thence down said branch to the beginning," not by a *direct line* to the beginning, and my opinion is, that "down the branch" and "with the branch" are equivalent terms, and not being qualified by any other terms, the given or home line must pursue the meanders of the branch, by which the survey can be as well closed as by a straight line, as is apparent upon the face of the plat.

But the complainants' counsel insists that this point, and indeed his title to relief, sought by his bill, has been adjudicated in his favor by Charles County Court, by the order of the 19th of June, 1844, referring the cause to the Auditor.

I do not so understand that order. It instructs the Auditor to report the amount of loss sustained annually by the complainant, in consequence of the defendant's withholding from him the use of the land lying between the meanders of the stream and a straight line as laid down on the plat, and it is very probable when that order was passed, the court thought the complainant would be entitled to relief to the extent of such loss. But surely it is not a final adjudication to that effect. It does not so settle the right of the parties that an appeal would lie from it. The order of the Chancellor in the case of *Hogthorp vs. Hook*, 1 *Gill & Johns.*, 271, was far more precise and specific, and yet the Court of Appeals refused to entertain an appeal from it, saying, that however clearly the Chancellor may have

intimated his opinion, or declared his intention, the rights of the parties were unaffected by such declaration, it being competent to the Chancellor, in any subsequent stage of the cause, to change or abandon his opinion at his pleasure, or according to the dictates of his judgment upon further consideration.

The order, therefore, of the County Court of June, 1844, was no adjudication. It settled nothing, however plain the inference may be that in the opinion of the court at that time the complainant was entitled to a credit for the loss he may have sustained by the act complained of.

The purchase money of the land was fifteen hundred dollars, and the bill speaks only of payments amounting to eight hundred dollars, leaving of course seven hundred of the principal to be accounted for. The judgment against which the injunction was granted is for \$350, with interest from the 30th of March, 1832. How the difference was paid, if paid at all, does not appear, but the judgment is all that is now claimed, and I can see no reason why this should not be paid, unless some good objection exists which has not yet been considered.

It appears by a short copy of the judgment which was filed as an exhibit with the bill, that it was entered for the use of Eleanor B. Hatton, administratrix of Nathaniel Hatton, but she was not made a party, and the cause having been removed to this court, she, on the 20th of October, 1852, filed a petition in which, after alleging that the cause of action was absolutely assigned to her for a valuable consideration, she prayed to be allowed to become a party and prosecute the cause, notwithstanding the death of Peter D. Hatton, who departed this life after the proceedings had been transferred to this court, the petition alleging the death of Hatton intestate, and that no administration had been had upon his estate. No cause to the contrary having been shown, after notice to the complainant, an order passed on the 14th of February, 1853, allowing the petitioner to appear and become a party defendant, with liberty to the complainant to file an amended bill without prejudice to the injunction as he might be advised, and reserving all questions touching the regularity of the proceedings and the merits of the cause for further consideration.

The complainant not having availed himself of the liberty to amend his bill, the petitioner, on the 9th of June, 1853, filed another petition, in which, after alleging his neglect to do so, she asked that she might be heard on the merits, upon the pleadings and proofs as they then stood, and upon this petition an order was passed directing the cause to stand for hearing at the then ensuing July term.

After this, that is on the 31st of October following, the complainant filed an amended bill, in which, after stating the death of Peter D. Hatton, intestate, and that there was no administration upon his estate, he avers that the petitioner hath no interest in the judgment, her claim thereto being, as he alleges, fraudulent, and set up to deprive him of his right to relief against the same. The petitioner, Eleanor B. Hatton, is made a party to this amended bill, and she is required to answer it, but not under oath. She has answered it, maintaining that the assignment to her of the cause of action upon which the judgment was rendered, was *bona fide*, and for a valuable consideration, and there is no proof of the allegation to the contrary in the amended bill.

Under these circumstances, I am of opinion, that the complainant has not made out a title to be relieved against the judgment. The bond of conveyance is drawn most carelessly. It binds Hatton to convey the land to the complainant, but says nothing about the previous payment of the purchase money. Still, I suppose, a conveyance would not be decreed by a court of equity without payment or tender of the money, and I can see no sufficient reason for staying the collection of the money, unless upon a bill offering to pay the whole amount, upon the execution by the vendor of a deed in compliance with the condition of the bond and praying for an injunction to stay proceedings at law to enforce payment, until a deed with proper covenants should be executed. The present bill is not one of that character. It does not allege that the amount for which the judgment was rendered is the balance due for the land, and offer to pay it upon receiving a proper conveyance. It does, to be sure, make some loose objections to the title, but its alle-

gations in that respect are denied by the answer, and there is no attempt to support them by proof, except with regard to the portion of the land, which, as already decided, was not included in the purchase.

As the case is brought before me, I must assume, and do assume, that the note upon which the judgment at law was recovered, was assigned, *bona fide*, and for a valuable consideration, to Eleanor B. Hatton. It has not been alleged in the pleadings, or shown by the proof, that upon the payment of the judgment the plaintiff will be entitled to call for a conveyance. He does not place his case upon any such ground, and ask that the court will protect him against execution on the judgment until he is secure in his title to the land. The ground on which he applies for relief, is of a totally different character, and as has already been shown, he has failed in establishing it. The injunction will, therefore, be dissolved, and the bill dismissed.

RANDALL, for Complainant.

STOCKETT, for Defendants.

SARAH B. MAYO AND OTHERS,	}	
vs.		
ISAAC MAYO AND OTHERS.	}	JULY TERM, 1847.

[CONSTRUCTION OF WILL—ELECTION.]

A party, by a declaration of trust, settled upon his son and daughter certain bank stock, which he declared he would hold in trust for them, the dividends to be paid to them equally, share and share alike, and on the death of the daughter, one-half to be transferred to her children, and on the death of the son, the whole to be transferred to his daughter and her children, and subsequently made his will, devising certain property, including this stock, in trust for his son, and expressed a desire in the will that the son should elect to take thereunder. He also gave to his wife certain property for life, confiding to her the care and maintenance of his son, and after her death, he gave his son in addition, a life annuity of \$600. The son elected to take under the will.

HELD—

- 1st, That by this election, the declaration of trust, so far as the son is concerned, is to be treated as a nullity, and the trust under the will extends to, and comprehends, the dividends upon the stock, which became due after the date of the will, as well as those which were declared previously.
- 2d, That the trusts created by the will in favor of the son take effect immediately upon the death of the testator, and are not suspended until the death of the widow of the testator.
- 3d, The will not having disposed of the portion of the stock given to the daughter and her children, and there being no expression in the will of the testator's wish that they should take thereunder, they are not required to elect to hold the stock under the will, or the declaration of trust.
- A will operates upon whatever *personal* estate the testator dies possessed of, whether acquired before or after the execution of the instrument.
- A testator confided to his wife, to whom he had given a large portion of his estate, the care and maintenance of his son, and after her death he charges upon his estate an annuity of \$600 per annum, and provides that this annuity, with all the other property given to his son by his will, should be held in trust by his executor "for the use and benefit of his son during his natural life," and declared "his intention" to be to assure to him "an ample and independent support," so far as the law will allow. **HELD—**
- That the income of the trust estate was to be paid over to the son during the life of the testator's widow, and not to accumulate during that time, and form part of the principal; it was not the testator's intention to give his son, during the life of his wife, a mere indefinite claim upon her for care and maintenance.
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[The following are the substantial facts in this case. The late Chancellor Bland, by a declaration of trust, (the terms of which are sufficiently stated in the first of the following opinions in this case,) dated the 20th of December, 1843, settled upon his son William G. Bland, and his daughter, Mrs. Mayo, certain shares of bank stock, formerly belonging to Sophia Bland, his sister, and to which he was entitled, as administrator and distributee, and afterwards, to wit, on the 2d of May, 1845, executed his will, the material provisions of which, so far as they relate to this case, are the following:

"I, Theodorick Bland, after much consideration of the peculiar circumstances of my family, do make this my last will for the disposition of all my property after my death."

"I do hereby give and devise all my property, real and personal, of every description, except Blandair, and the slaves, with their increase, which I derived in a course of distribution

from my uncle, Thomas Fitzhugh, deceased, and the other personal property thereon, not slaves, and used with the same at the time of my death, and except the bequests hereinafter mentioned, unto my wife, during her natural life, confiding to her the care and maintenance of our son, should he so long live."

He then devises the property excepted in the previous clause to his daughter for life, "and after her death, as hereinafter provided, she, and those taking after or under her, paying therefor to her mother, during her natural life, annually to be computed from the day of my death, the sum of \$300 by way of a rent charge." The will then proceeds thus :

"As it is my belief that my son will never be in a situation to maintain a wife and family as he himself would wish, so I do most earnestly hope and trust he may never marry, and, therefore, intending that he shall and will, for his own security, elect to take that which I do hereby give him, together with land, stocks, and all other property which he now holds, all of which I have, in one way or other, heretofore given him, under this my last will, and which I do hereby give and devise to him, and in addition thereto, an annuity of \$600 per annum, to be paid to him half yearly from the day of his mother's death, when his claim to a maintenance out of the devise to her, as before mentioned, will cease, or in case my wife should die before me, then the said annuity to my son to commence and be paid half yearly from the day of my death. The said annuity, together with all other claims and property, so as aforesaid, heretofore or hereby given to my son, to be held in trust by my executor, Captain Isaac Mayo, for the use and benefit of my son during his natural life, and no longer, and to secure the regular and punctual payment of the said annuity unto my son during his natural life, by my daughter, or the person or persons claiming after or under her in respect of the property which she or such person or persons may take under this my will, I do hereby charge and bind all my estate, real and personal, including the before mentioned Blandair estate and property, without exception, whoever may be the holder of the same, or any part thereof, with and for the payment of the said annuity to my son."

“But my son, should he feel himself competent and so disposed, may, by his last will, made according to law, give all or any portion of the property he may, so as aforesaid take under this my last will, unto my daughter, his sister, or to any one or more of her children or descendants, in such manner and upon such terms as he may think proper, and if my son should make no such last will, then all the land and property heretofore given to him as aforesaid, to descend and pass as a part of the residue of my estate as hereinafter directed.”

“My intention by the foregoing restrictive provisions on my son, being as effectually as the law will allow, to assure to him an ample independent support during his natural life, so that it may not be lost by any imprudence of his own, or by any misconduct of others, and at the same time to leave him something to bestow upon the nearest, most natural and best objects of his affections, by whom, I trust, he may be always treated most respectfully and kindly.”

He then bequeaths certain books to his son-in-law, Captain Isaac Mayo, and expresses a wish that “the copy of his reports of cases in chancery in his use at the time of his death, and in which I have made many additional references in pencil,” should be presented and given to one of his grand-children by their parents. All the rest of his books, with his household furniture, to be preserved by his wife for her own use during her life, or to be sold, or to be given to his children or grand-children in such manner and proportions as she may think proper. “All my manuscripts concerning law or any other subject to be burnt as being of no value, and utterly unfit for publication.”

He then makes disposition of certain real estate in Virginia, directing it to be sold, and the proceeds applied in payment of his debts in exoneration of his real and personal estate in this state; the residue to be invested and held by his wife during her life, and “to be bound as aforesaid for the payment of the said annuity to my son, and then to go with and as a part of the residue of my estate, as hereinafter directed.”

He then gives and devises “all the rest and residue of his property, real and personal, of every description, not herein otherwise or fully disposed of after the death of my wife, unto

my daughter during her natural life, and after her death, to her child or children, or their descendants, if any, equally, in fee simple, subject, however, to the life estate and powers hereinafter given."

He then gives to his daughter the power, if married, by any writing in the nature of a last will, made altogether in her own hand-writing, or attested as the law requires in cases of wills, or if sole, by her last will made according to law, to give and devise the said residue of his estate to any one or more of her children or descendants, upon such terms, and in such proportions as she may think proper, with further power by her will, or any instrument in writing in the nature of a will as aforesaid, to provide for the contingency of her own death without a child or children, or descendants of such then living, and of the death of the testator's son without a child or children, or the descendants of such living at the time of her death, by giving and devising the said residue of his estate in that event unto such person or persons as she may think proper.

He then provides that in case his daughter should die, leaving her present husband, Captain Isaac Mayo, surviving her, he shall have and enjoy the said residue of his estate during his life, and in case his daughter shall have made no such direction and appointment as aforesaid, then he may by his last will give and devise to the children and descendants of his daughter, the said residue, to them or any one or more of them, in such manner and proportions as he may think proper.

He then provides, in case neither his daughter or her husband should make any such disposition as aforesaid, then said residue shall descend and pass from his daughter, according to law, as if she had been the legal owner thereof in fee simple, and absolutely by purchase, and had died intestate.

He then appointed his wife, Sarah Bland, and his son-in-law, Captain Isaac Mayo, the executrix and executor of his will.

The testator died on the 16th of November, 1846, and his widow having renounced the executorship, letters testamentary were granted to the executor, Captain Isaac Mayo, named in the will.

The other proceedings in this case are fully stated below, and in the following opinions of the Chancellor.]

THE CHANCELLOR :

By a paper executed on the 20th of December, 1843, the late Chancellor Bland settled on his daughter, Mrs. Mayo, and his son, William G. Bland, certain shares of bank stock which, by the said paper, he declared he would hold in trust for them, the dividends, as they accrued, to be paid over to them equally, share and share alike. On the death of the daughter, one-half of the said stock to be transferred to her children, &c., and on the death of the son, the whole of the said stock to be transferred to his daughter, should she be then alive, if not, then the whole or the residue thereof to be transferred to her children, &c.

The declaration of trust appears to have been duly executed by the party making it, from its date until his death, which occurred in November last. But on the 2d of May, 1845, the late Chancellor made and executed a last will and testament in proper form, by which he gave to his said son certain beneficial interests, including this stock, and expressed in the instrument a desire that he should elect to take thereunder, and in the same will there are devises and bequests to the testator's daughter, Mrs. Mayo, upon whom, by the said declaration of trust, the other portion of the bank stock had been settled as therein provided.

To the widow of the testator, the whole of his property, real and personal, was given, with the exceptions mentioned, during her natural life, confiding to her the care and maintenance of his son, should he so long live. In the event of the death of the widow, living the son, and from the period of her death, the will gives the son, in addition to the other devises and bequests in his favor, a life annuity of \$600, the said annuity, with all other claims and property, so as aforesaid or thereby given to the son to be held in trust by the executor of the will, Captain Isaac Mayo, for the use and benefit of his son during his natural life, and no longer.

There was also a provision that the son might, should he feel himself competent and so disposed, by his will, give all the property which he might take under the will of his father to his sister, Mrs. Mayo, or to any one or more of her children or their descendants. The testator also declared in the restrictive provisions of his will in regard to his son, his intention was as effectually, as the law would allow, to assure to him an ample independent support during his natural life, so that it may not be lost by his imprudence, or the misconduct of others, giving him at the same time something to bestow upon the nearest and most natural objects of his affection.

There being no provision in the will, or in any other instrument of writing, for the appointment of a successor to execute the trust created by the paper of December, 1843, a bill was filed in this court on the 21st of January last by the testator's daughter, Mrs. Mayo, and her infant children, suing by their next friend, against Isaac Mayo, the husband and executor of the will, (the widow of the testator jointly appointed with him having renounced,) William G. Bland, and the banks, praying for the appointment of a new trustee, that the executor may account for the dividends which may have been received, and remain unpaid and for general relief.

William G. Bland, by his answer, elected to take under the will, and insisted that the other parties interested should be put to their election also, the court making an election for the infants. It was also stated in the answer, and is conceded, that certain of the dividends which had been declared on the bank stocks, had not been paid to the said William G. Bland, and that a portion thereof so remaining unpaid were declared and became due after the date of the will. With respect to these dividends, the answer of William G. Bland submitted whether they were to be held in trust for or paid over to him, but in either event he claimed interest upon them from the periods when they respectively became due, except as to the two first dividends in the Bank of Baltimore, as to which he stated he had agreed with the deceased in his lifetime to waive all claim for interest before the 1st of November, 1845.

Answers were filed by the banks and Captain Mayo, but they do not appear to be material to the questions submitted for decision, and which have been argued, in writing, by the counsel for the parties. The first of these questions relates to the supposed obligation of Mrs. Mayo and her children, to elect to hold the bank stock under the will, or declaration of trust.

Upon a deliberate and careful reading of the will, I am unable to find any provision which requires such election to be made. The will does not profess to dispose of that portion of the bank shares which, by the declaration of trust, is given to the daughter and her children, nor is there any expression of a wish on the part of the testator, that she or they shall elect to take under his will as there is with regard to the son. The presumption is very strong, not to say irresistible, that if it had been the design of the testator to put her to such election, he would have said so, when it is plain this very subject of election was present in his mind, and he was expressing an earnest wish that his son should elect to hold under the will. In the absence of any such declared wish with reference to the daughter, and there being nothing in the will from which it can be inferred that the testator intended to deal with this stock, or that portion of it which he had given to her and her children as subject to his will, I am of opinion that she and they are not required to elect.

2d. Looking to the entire will, and every clause thereof, as it is proper to do for the intention of the testator, I am of opinion, also, that the father designed that all the property which his son took under it should be held in trust for his use, and that the trust extends to and comprehends the dividends upon the bank stock, which became due after the date of the will as well as those which were declared previously.

By electing to take under the will and not under the declaration of trust, the latter instrument, so far as the son is concerned, is to be treated as a nullity. Every beneficial interest under it which William G. Bland might have otherwise claimed, not only with regard to the principal, but its fruits, is waived, and in lieu thereof he elects to take that which is given him by

the will. The testator evidently intended to dispose of this stock. He speaks of stocks which he had given his son, and expresses his will that they and all other property and claims shall be held in trust by Captain Mayo for the use of his son. He treats this bank stock as subject to his will, and the dividends upon it then due or thereafter to become due, must pass with it. Though the will is different with regard to real estate, it is well settled that a will operates upon whatever personal estate the testator dies possessed of, whether acquired before or after the execution of the instrument. 1 *Williams on Executors*, 6; 4 *McCord*, 39; and as the testator deals with this stock as his own, and the son, by his election, has consented that he will take it under the will, the dividends, though they may have accrued after the date of the instrument, must be considered as passing under it.

In the provisions of this will, so far as the son is concerned, there is a marked anxiety to provide for him a comfortable support during his life, to guard him against imposition, and a willingness to gratify him in any natural desire he may feel to select among those persons who stand towards him in the nearest and dearest relation, the individual or individuals upon whom he may bestow in the way pointed out, the bounty acquired by him under his father's will. This purpose, it seems to me, would be clearly frustrated by a construction which would place one portion of the property in trust, and leave another subject to a different disposition.

3d. The third question submitted is, whether the trust created by the will takes effect prior to the death of the widow of the testator, the tenant for life, or in other words, whether the election of William G. Bland to take under the will of his father operates immediately, or shall be suspended until the death of his mother?

My impression is, that it cannot be so suspended, and that all the arrangements of the will would be disturbed by a contrary decision. It is admitted by the solicitors on both sides, that an account must be taken, and an order to that effect will be passed, and Captain Isaac Mayo will be appointed trustee to

supply the want of a trustee under the declaration of trust of December, 1843. He will be required to give bond as such, and also as trustee for William G. Bland under the will.

The solicitor for the complainant will prepare an order in conformity with the views thus expressed.

[An order was then passed, dated the 1st of September, 1847, first: ratifying the election of William G. Bland to take under the will of his father, said election to take effect from the death of the testator, upon all the real, personal, and mixed estate which the said William then held or possessed, including one-half of the bank stock conveyed by the declaration of trust set forth in the proceedings, and the rents, dividends and profits thereof, all of which he is hereby required to account for, and so far as are in his possession, deliver over to Isaac Mayo, the trustee therefor, as hereinafter set forth. Second: appointing said Mayo trustee in the place of the testator, to have and to hold the other half of the aforesaid bank stocks under the declaration of trust above mentioned, for the use and benefit of his wife and her children, according to the said declaration of trust, and requiring him to give two bonds, one for the faithful performance of his duties as trustee of the estate of William G. Bland, the other as trustee of the estate of his wife and her children, and also to file schedules of the property, with the appraised value thereof, which shall come into his hands as trustee for said estates. Third: directing the banks to have the stock standing on their books in the name of Sophia Bland transferred to said Mayo, the one-half to be held by him in trust for his wife and her children, under said declaration of trust, and the other half to be held by him as trustee of the estate of William G. Bland, under the will of said testator. Fourth: directing said Mayo to pay the costs of these proceedings, one-half out of the trust estate of said William G. Bland, the other out of that of his wife and her children. Fifth: referring the cause to the Auditor to state such accounts as may be required, and authorizing the parties to take testimony upon giving the usual notice, and sixth: ordering said Mayo to de-

posit with the proper officer of any corporation or body politic, or person, with or in whose possession any portion of the trust estate of William G. Bland may be, an authority, empowering him, the said William, to receive the rents, issues, dividends, interest, and profits thereof, the said authority to be subject to the future order and direction of this court, and with liberty to the said trustee and, *cestui que trust*, to apply for such future directions as may from time to time appear to be necessary.

Afterwards, on the 30th of August, 1849, the trustee Mayo, filed his petition in which, after stating his appointment under the order of the 1st of September, 1847, he alleges that the rents, issues, dividends, interest and profits of the trust estate of the said William G. Bland, amount to about \$300 per annum, which the said William has hitherto received, and so far as petitioner can judge, misapplied the same, or a part thereof: that under the will of the said testator, the said William is entitled to care and maintenance from the widow of the testator, to whom he devised and bequeathed certain parts of his estate, subject to the care and maintenance of said William, and, that, therefore, none of the said profits, rents, issues, &c. are required for his support, and if any may be required he has not the suitable judgment and skill in making the proper application thereof; that there might be, and should be, by proper management, the whole or a greater part of said rents, issues, &c., applied to the enlargement of the said trust estate, according to the declaration of trust and last will of the testator. The petition, therefore, prays the court to rescind so much of the said order of the 1st of September, 1847, as requires the petitioner to allow the said William, personally, to receive the said rents, issues, &c., and that the same may be received by petitioner, as trustee as aforesaid, and applied by him as duty requires, and for general relief.

At the same time the trustee made a report, in which he states, that said William has refused to deliver up to him the trust property, though frequently requested so to do; that since his former report, he has been compelled, from a well founded apprehension, that negro man Phil, belonging to said trust es-

tate, would escape out of the state, to sell him; that he has received for him the sum of \$600, which he holds subject to the court's order, and for which, until invested, he will allow interest.

This petition was set down for hearing by an order of the Chancellor, by a day fixed, provided a copy thereof be served upon the said William G. Bland, and Sarah Bland, the widow of the testator, on or before a certain day. The latter filed her answer thereto, in which she admits that said William is entitled to care and maintenance from her, which she avers she has faithfully given to him at great cost and sacrifice, but she also says there is no man in the state better qualified to take care of his money than the said William, and that she does not believe he ever wasted a cent in his life.

It was admitted that Mrs. Bland, the widow, has elected to take under the will, by suffering the time to elapse without renouncing, as required by law.

William G. Bland, by his answer, denies that he is incapable of taking care of his income, or that said Mayo has any right to inquire into the mode in which he may dispose of the same. He admits his right to care and maintenance from his mother, and that he has received it. He further states, that at the time he made his election, he was informed by his solicitor that he would have the control of his income to do with it as he pleased, and but for that belief, in which all parties acquiesced, he never would have made the election, and the said Mayo also informed him such was the case. He further states, that the net income of his estate which he owned at his father's death, and so elected to take under his will is only about \$280 per annum, and for the true construction of said will he refers thereto, by which it will appear that the novel and strange pretension of the said Mayo is entirely unsupported, and is against its whole tenor and purpose.

Afterwards the said William G. Bland filed his petition, in which, after stating that it appears from the report of said Mayo, that he has sold negro Phil, belonging to petitioner, for \$600, upon the alleged ground that he was about to escape from the state, he avers that he knows nothing of any such intention except from the statement of said Mayo, and submits that

the latter ought to be put upon proof of the same ; that he had no notice of said Mayo's proceedings, and that he had no right to sell the slave without such notice and an order of court ; that said slave hired at the rate of \$60 per annum, and was worth about \$80 a year, and that if the court should sanction this unauthorized and oppressive proceeding, he is entitled to have the proceeds so invested as to preserve for him an equal amount to the value of the hire aforesaid.

The trustee, Mayo, in his answer to this petition, states the grounds of his apprehension in regard to intention of the negro to escape, and that what he did in the premises was done as a matter of duty, and after consultation with his solicitor.

In support of the petition of the trustee, the deposition of J. N. Watkins was taken, who stated that about twelve years since, at the request of Chancellor Bland, he took the said William to the insane hospital near Baltimore ; that he was then in such a state of derangement as to render the use of a straight-jacket necessary ; that afterwards he returned to the Chancellor's and lived in his house many years, until the latter's death ; that since his return from the hospital, deponent has had no opportunity of knowing the condition of his mind. Also the deposition of said Mayo, in which he detailed conversations which he had with the said William in reference to the mode of disposing of his income, and that from these, and all the information he has been able to obtain on the subject, deponent believes the same is not properly applied, but on the contrary wasted and misapplied by the said William.

Upon the hearing of these petitions, the Chancellor delivered the following opinion.]

THE CHANCELLOR :

The question which arises upon the petition of Captain Isaac Mayo, depends upon the true construction of that part of the will of the late Chancellor Bland, in which provision is made for his son William G. Bland.

The petition alleges, that by proper management, the whole or a greater part of the income and profits of the trust estate

given by the testator to his son might be applied to its enlargement and that the same is now misapplied.

By the construction contended for, the interest of the trust estate, stated to be about three hundred dollars a year, must be accumulated and added to the principal, and either pass with the principal under the restricted testamentary power given by the will to the son of the testator, or descend and pass as part of the residue of the estate, as by the said will is provided. But, in my opinion, this is not the proper construction of the will. It is true, the testator confides to his wife, to whom he gave, during her life, a large portion of his estate, the care and maintenance of his son, and that upon her death, he charged upon his estate an annuity of six hundred dollars to be paid his son, half yearly, from the day of his mother's death, when his claim to a maintenance out of the devise to her would cease. But the will expressly provides that the said annuity, together with all other claims and property so as aforesaid, heretofore, or hereby, given to his son, should be held in trust by his executor, Captain Isaac Mayo, for the use and benefit of his son during his natural life, and no longer.

The claims and property, therefore, by the will gives to the son of the testator, the whole of which the will declares the testator had given him, in one way or other, during his life, was to be held by his executor in trust for the "use and benefit" of his son during his natural life, and yet it is maintained by the executor and trustee, that these words "use and benefit" mean no more than that the income and profits of the trust property shall accumulate, and with the principal, be subject to the limited power of devise given to the *cestui que use* by the will of the father. The position is, that the mother is, by the will, bound to take care of and maintain the son, and that, therefore, the profits of the estate given him by his father are not to be placed in his hands, or to be used or spent by him in any way. If this be so, if the son is to have no income of his own, but must during the lifetime of the mother look exclusively to her for all his supplies, how can it be said that he will enjoy that "ample and independent support" which his father said it was his intention to assure to him?

I cannot, looking to the entire frame and texture of this will, bring myself to think that the testator intended during the life of his wife, to give to his son a mere indefinite claim upon her for care and maintenance. Certain it is, that after the death of his wife, he did not design to confine his son to this indefinite kind of provision, for the will expressly directs, that upon her death, the annuity of six hundred dollars shall commence to be paid to him, half yearly, from the day of her death. And it may well be remarked, if the testator thought his son capable of receiving and properly applying this annuity, there can be no good reason for supposing that he considered him incapable of making a proper use of the income of the trust estate. The will, it may be observed, does not say one word about accumulations of the trust estate. The language is, that "his son, should he feel himself competent and so disposed, may, by his last will, made according to law, give all or any portion of the property which he may so as aforesaid take under this my last will unto my daughter, his sister," &c. If he had intended that the property so given his son with its accumulations should be so disposed of by the latter, is it not presumable he would have said so in terms?

My opinion is, that the testator intended to trust his son with the receipt and use of the income of his estate, and that he was not to be dependent entirely on his mother for the means of gratifying his wants and his wishes. His father says, "he intends to assure his son an ample and independent support as effectually as the law will allow," and I am at a loss to see how this intention, so emphatically expressed, can be gratified, if for every dollar he may require for any purpose he must apply to others.

The answer of William G. Bland, to the petition of the trustee, denies that he is incapable of taking care of his income, and I can find no evidence in these proceedings to outweigh this denial. There is nothing certainly to show that the mental condition of the son has become worse since his father's death, and as has been already remarked, his father unquestionably thought him capable of taking care of his annuity, for he ex-

pressly directs it to be paid to him. The petition, therefore, for these reasons, must be dismissed with costs.

The remaining question arises upon the petition of William G. Bland, filed on the 4th of October last, and the answer thereto of Isaac Mayo.

Upon carefully considering all the circumstances attending the sale of the negro Phil, I am of opinion, that the trustee, had reasonable grounds for apprehending he might run away, and that in selling him he has done nothing which should subject him to the censure of the court, and that in view of the insecure and perishable nature of such property, the *cestui que trust* will be adequately indemnified by receiving the interest upon the purchase money. It is true, the parties interested in remainder after the life estate of the *cestui que trust* are benefited by the sale, because by it, they are protected from the contingency of the death of the slave before the life estate may be determined. But this advantage to them is not secured by any corresponding sacrifice of the rights of the first taker, if the interest on the purchase money upon a fair computation may be considered a reasonable equivalent for the services of the negro if he had not been sold. He was hiring at the time of the sale for sixty dollars per annum, but after deducting the expenses of clothing him, estimated at twenty dollars, the net income very little exceeded the interest on the sum for which he sold, without making any allowance for medical attendance and other contingencies proper to be considered. In view of these and of the chance of the death of the slave, during the continuance of the life of William G. Bland, and the numberless casualties to which such property is exposed, I am clearly of opinion, that the legal interest on the sum for which he sold, secured absolutely during the life of Mr. Bland, is a full indemnity to him. The money must, however, be invested under the order of the court, and made subject to the order of the 1st of September, 1847. The counsel may prepare an order in accordance with these views.

RANDALL, for the Trustee.

MCLEAN, for the Defendant.

[From the order dismissing the petition of the trustee, Mayo, the latter appealed to the Court of Appeals. In that court the cause was argued before *LeGrand*, C. J., *Eccleston* and *Mason*, J., by *Randall & Hagner*, for the appellant, and by *McLean*, for the appellee. The following is the opinion of that court, delivered by his honor *Chief Justice LeGrand*.]

“We entirely concur with the Chancellor, both in his reasoning and the order which he passed in this case. It was manifestly the intention of the father of the appellee to provide him “an ample and *independent* support during his natural life,” and there is not the slightest evidence furnished by the record to justify the action of the Court of Chancery as asked for by the appellant. There is nothing to sustain the allegation that the appellee has squandered, or is likely to misapply, his income, nor is there any proof to show his mental condition to be different from what it was when his father, by his will, so carefully assured to him “an ample and independent support.” We regard the petition as wholly unsustained. *Order affirmed*.”

JOHN TOLSON,
vs.
HENRY TOLSON ET AL.

} JULY TERM, 1853.

[EXCEPTIONS TO TESTIMONY.]

WHERE testimony taken under a commission has been returned and filed in court for more than eight months, and been made the foundation of the Auditor's report, to which report exceptions were filed, and which was submitted for final decision, it is too late for one of the defendants, who was examined as a witness, to ask that the commission be remanded upon the ground that the commissioner had made mistakes in writing down his testimony. Exceptions to such testimony, upon the ground that the parties had no notice that the defendant was to be examined as a witness, and that they, therefore, had no opportunity of cross-examination, will not be sustained, if they had notice of the time and place of the execution of the commission. The omission to procure the previous order of the court for the examination of a defendant as a witness, is a mere irregularity, and when it is apparent

no substantial injustice has been inflicted upon the opposite party by denying him the benefit of a cross-examination, and that delay and injury will be visited upon the party relying upon the proof, an objection thereto on this ground ought not to prevail.

The order for the examination of a party, as a witness, is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in.

[The proceedings in this case up to December, 1849, are very fully stated in the report of the case in 8 *Gill*, 376, and in 10 *G. and J.*, 159. The proceedings in this court since the cause was reinstated therein in 1849, are sufficiently stated in the following opinion of the Chancellor, delivered on the 1st of August, 1853, upon the hearing of the petition of the defendants, and the exceptions to the Auditor's report and accounts.]

THE CHANCELLOR :

The original bill in this case was filed in March, 1834, and the cause, therefore, has been pending nearly twenty-five years, during which long period the complainant has been deprived, for the most part, of the support which, according to two several adjudications of the Court of Appeals, he is unquestionably entitled to. It would, therefore, be a subject of regret if any substantial and insurmountable objection existed to the speedy determination of the controversy.

After the decision of the Court of Appeals at the December term, 1849, and the reinstatement of the cause in this court, a commission issued, by consent, to John C. Mullikin to take further evidence, and the depositions of several witnesses were taken and returned by him in November, 1852. Among them is the deposition of Edward Tolson, who appears, by the return of the commissioner, to have been examined on the 19th of September, 1851. This deposition has, to some considerable extent, been made the basis of the last report of the Auditor, and the principal ground of objection to that report urged on the part of the defendants, refers to that deposition and the influence it has had upon the account.

It is to be remembered that the witness is himself a defend-

ant equally bound with the other defendants to contribute to the support of the plaintiff, John Tolson ; that he was swearing against his own interest, in like manner, as against his co-defendant's, and that every objection, therefore, to his proof coming from himself and his associates should be regarded with some degree of jealousy. The deposition, as has been stated, was taken in September, 1851, and was returned to, and filed, and has remained in this court since the 15th of November, 1852, without a whisper from any quarter that there was any mistake or misapprehension in the nature or purport of the answers given by him to the questions until the petition of himself and others was filed on the 30th of July last. The Auditor, in the mean time, had made his report, founded in part upon this evidence. This report was filed prior to the commencement of the recent July term of this court, and was submitted on the part of the complainant on the 19th of that month, during the sittings ; exceptions having been filed thereto by both parties, and at the close of the sittings was in strict conformity with the practice laid before the Chancellor for his decision. It was in this state of the case, after the sittings of the term had expired, that a petition was filed by the same Edward Tolson and others, alleging errors committed by the commissioner in writing down his testimony, exhibiting in writing, and in the form of a deposition, what he alleges was, or was intended to be, his proof before the commissioner, and praying that the commission may be remanded, thus causing additional delay, or that the complainants may be required to admit the corrections of the proof the witness displayed upon the face of this paper.

My opinion is, that neither alternative of this application can be granted. The proof had been taken, and lying in the office of the register of this court for upwards of eight months, subject to the inspection and examination of all parties, and the Auditor's report, founded upon it, was likewise filed prior to the commencement of the recent term. To this report both parties filed exceptions, but no complaint was heard that the proof of Edward Tolson was not reduced to writing correctly

by the commissioner until the term had closed, and the papers were with the Chancellor for his decision. Under such circumstances, I cannot bring myself to think it would be compatible with justice, the practice of the court, or the analogies to be derived from proceedings at common law, to allow the witness to take back or explain proof which he had given nearly two years before, and which had been in court, and subject to the inspection of all parties, for upwards of eight months. No sufficient excuse, in my opinion, is given for this great negligence, and I am not disposed, in the absence of such excuse, to sanction a practice from which so much inconvenience might be fairly apprehended. The petition, therefore, will be dismissed, and the only question then arises upon the exceptions to the last report of the Auditor.

The sixth exception of the defendants to the report filed on the 21st of July last, and in their exceptions to the testimony filed on the 30th of the same month, the testimony of the said Edward Tolson is excepted to upon the ground that the previous order of the court for his examination had not been obtained, and in the paper last filed, it is said that none of the parties except the witness himself had notice of his examination, or opportunity of cross-examination.

But this statement, that the defendants had no notice of his examination, if it refers to the time and place of his examination, is contradicted by the return of the commissioner, which states expressly that the meeting at Bladensburg on the 19th of September, 1851, when he was examined on the complainant's interrogatories was, "pursuant to previous notice thereof given to the parties." The defendants, therefore, had notice that on that day, and at that place, the complainants would proceed to take proof, under a commission issued by consent of parties, and it was their own negligence if they did not attend. It is true they were not specially notified that Edward Tolson would be examined, but they knew that proof would be taken, and might and ought to have been present. Nor can it be said they have been deprived of the privilege of cross-examining the witness, for it cannot be doubted that if application had

been made in a reasonable time after the return of the commission, that such privilege would have been accorded them. The commission to Mr. Mullikin, issued in February, 1851. The witness, Tolson, was examined in September of that year, and the proof was returned to the office in November, 1852, and it is not until July, 1853, after the Auditor's report was filed, and the cause submitted to the court for final decision, that the defendants set up the objection that there was no previous order for the examination, or opportunity of cross-examination.

If they have lost the benefit of the cross-examination, they have none but themselves to blame, and the question, therefore, is, whether, in the absence of all substantial ground of objection, the mere omission to procure the order of the court for the examination of the witness, (which is almost always passed as of course,) shall exclude it from consideration?

The order for the examination of a party, says the late Chancellor Bland in *Lingan vs. Henderson*, 1 *Bland*, 268, "is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in." The omission to procure the previous order of the court is at most a mere irregularity, and when it is apparent, as in this case, that no substantial injustice has been inflicted upon the opposite party by denying him the benefit of a cross-examination, and that delay and consequent injury will be visited upon the party relying upon the proof by allowing the objection to prevail, it seems to me it ought not to be permitted to do so.

The lying by and withholding the objection until the present time, when it might have been interposed at an earlier period, and thus vexatious delay and expense avoided, relieves the court, in my judgment, of all obligations to give effect to it. In speaking of an objection to testimony of this description, the Court of Appeals, in the case of *Jones vs. Hardesty et al*, 10 *G. and J.*, 414, say, "had this irregularity been made the subject of an exception to the testimony in the County Court, it *might* have been available to the appellants in this court."

But it by no means follows that the objection, if presented in the form of an exception in the inferior court, would have

been fatal to the admissibility of the proof on appeal, for as I think it is not to be doubted that many circumstances might exist which would make it inequitable to give it that effect. Such circumstances, as I conceive, exist in this case, and, therefore, the exception must be overruled.

To the last report of the Auditor, both sides have excepted upon various grounds. The complainant's first and second exceptions, in my opinion, cannot be sustained. The Auditor has, I think, stated correctly the result of the proof with reference alike to debits and credits.

The complainant's third exception must share the same fate as the first and second. It complains that the Auditor has given weight and credence to the testimony of Ann McPherson, which he was not only authorized but required to do by the opinion of this court of the 14th of June, 1847. That opinion, in that respect, not having been disapproved of by the Court of Appeals in the subsequent judgment pronounced by them, must be regarded as conclusive upon the point unless some evidence clearly discrediting the witness has been since introduced. In my opinion there is none such, at least, none strong enough to warrant the rejection of her deposition entirely, and the exclusion of it in making the average.

The complainant's fourth and last exception has regard to the mode in which the Auditor has charged the interest on the balances due at the expiration of each year. He insists that the account should have been stated with yearly rests. But in this the complainants are again in conflict with the opinion of the 14th of June, 1847, which says, "the defendants are chargeable with interest on the balances due for each year, as stated in former reports of the Auditor," and upon reference to these former reports, it will be found that yearly rests were not made. This exception, therefore, will likewise be overruled.

Having already said the Auditor had arrived at proper results upon the proof, both with regard to debits and credits, the defendant's first and second exceptions must be overruled. Nor can the third exception be maintained, because if, for any reason less would be required for the support of John Tolson from

the year 1845, or any other period, it was for them to show it by proof, and in the absence of proof it is not to be presumed.

The defendant's fourth exception must also fall, because it objects to the average made by the Auditor of the proof of the witnesses in regard to the credits. In his average he has included the testimony of Mary Ann McPherson, and has given the proper weight to it.

My opinion, then, is, that the account D., accompanying the report of the Auditor of the 9th of July last, is stated upon proper principles, and it will be confirmed, and the only other question has respect to the form of the decree. That is, whether the sum which shall be decreed to be paid by the defendants, shall be charged against them *in solido* or distributively. It may be that under the last opinion of the Court of Appeals this court is not prohibited from adopting the former mode of securing to the complainant the benefit of the lien given him by the devise in his father's will, but it is most certain the appellate court express a decided preference for the latter form of relief, and it will therefore be adopted, so far as the arrears are concerned. To prevent injustice, however, the decree will declare the whole sum in arrear a charge on the entire real estate, such being the express judgment of the Court of Appeals.

The decree, then, will provide that each defendant shall pay the complainant, or bring into this court to be paid him the sum stated in the memorandum appended to the said account. D., with interest on the proper proportion thereof. That in default of payment by any one of them, his share of the estate charged with the lien shall be sold, and the proceeds brought into court for disposition, and that in the event of the inability of any one of the defendants to pay his proportion, the complainant shall be at liberty to apply to the court for such order or decree against the others, as may be necessary.

And the decree will also provide for the payment by the defendants to the complainant of an annuity of one hundred and ninety dollars during his life, in semi-annual payments, commencing from the 1st of July, 1853, and for his costs to be

taxed by the register. The petition filed by the defendants on the 30th of July, 1853, will be dismissed.

ALEXANDER and PRATT, for Complainants.

RANDALL, for Defendants.

[From the decree passed in accordance with the above directions, an appeal was taken by the defendants, which is still pending.]

IN THE MATTER OF THE ESTATE OF }
 RACHEL COLVIN, A LUNATIC. } DECEMBER TERM, 1853.

[ALLOWANCE OF COUNSEL FEES, &C., TO THE COMMITTEE OF A LUNATIC.]

EXPENDITURES for stationery do not come within the range of disbursements, which a committee or receiver is permitted to make at the expense of the estate.

The first allowance is for costs of the commission, which includes legal costs with counsel fees paid by the petitioner in conducting the inquisition of lunacy, under which the party is found to be a lunatic, these are all allowed unless excluded by a previous order of the court.

Fees paid to counsel for conducting a controversy, as to whether the lunacy did or did not commence at an earlier date than the filing of the petition cannot be allowed out of the estate, they must be paid by the parties who carried it on.

Counsel fees paid for services rendered in litigating the question who should be appointed committee, will not be allowed out of the estate; if the parties interested differ, and choose to litigate this point, they must do so at their own expense.

Fees paid for legal services rendered, the committee, in the discharge of his duty as such, in defending and protecting the estate of the lunatic, are proper and fair allowances.

Costs and counsel fees paid by the committee and receiver, in carrying on a controversy in the Orphan's Court after the death of the lunatic in regard to the appointment of an administrator, cannot be allowed out of the estate.

The estate cannot be charged with the cost of a litigation about the appointment of a receiver, the parties carrying on such a controversy must do so at their own expense.

The committee and receiver holds his office at the discretion of the court, and

if a dispute arise in regard to the propriety of continuing him in it, or appointing some one in his stead, it must be conducted by the parties at their own expense.

If the official conduct of the committee be assailed, he may defend it, and if he does so successfully, the assailant will be made to pay costs, but fees to counsel, even in that case, should not be thrown upon the estate.

The committee will be allowed all proper and reasonable fees paid to counsel for advice and assistance in the discharge of his duty, and in aiding him to preserve and defend the estate, but beyond this he cannot go; if he chooses to carry on a litigation for his office, he must pay the costs himself.

[The former opinions of the Chancellor in this case are reported in 3 *Md. Ch. Decisions*, 278. The following opinion was delivered the 13th of February, 1854, upon the hearing of exceptions to the Auditor's report and accounts. The nature and purport of these exceptions sufficiently appear in the opinion.]

THE CHANCELLOR :

This case comes before the court upon exceptions to the report of the Auditor, and has been submitted and argued on the part of Benjamin H. Ellicott, the former committee and receiver.

In the Auditor's account, D., filed with his report of the 5th of November, 1853, the receiver is charged with the aggregate amount of sundry vouchers for which he had received credit in the account A., previously reported, amounting to \$117 98, and this charge is the subject of the first exception on his part.

The vouchers Nos. 121, 122, 123, 124 and 125, which in part make up the sum credited in account A., are not, in my judgment, proper to be allowed. They are for stationery, which do not come within the range of disbursements which a committee or receiver is permitted to make at the expense of the estate. They are neither legal costs or counsel fees, and so far as I am informed, have never been allowed. The exception, therefore, with reference to these items must be overruled.

But, in my opinion, the vouchers Nos. 126 and 127, are proper to be allowed. Mr. Ellicott was appointed committee of the estate of the lunatic on the 15th of September, 1851, and

it appears to me, these sums come fairly within the rule regulating allowances in such cases.

The second exception of the receiver relates to the charge against him in account D., of \$1200, allowed for counsel fees, in account A., being supported by vouchers Nos. 150, 151, 152 and 153, in part. The rule with reference to allowances to the committee of a lunatic is believed to be correctly stated in the *Maryland Ch. Pr.*, 236. The first allowance is for the cost of the commission which the author says is understood to include the legal costs with counsel fees, paid by the petitioner. They are, he says, all allowed unless excluded by a previous order of the court. The estate, in this case, is a very large one, and on that account and because of the necessity of proceeding with great caution in the discharge of his duty, a liberal allowance should be made to the committee for counsel fees paid for professional services rendered him in that capacity.

It appears from the record before me, that there was no doubt of the lunacy of Rachel Colvin when the petition was filed in Baltimore County Court, by Richard C. Warford, in November, 1850, nor that she was in that condition as early as April, 1849. In fact, Elisha Warford and those who co-operated with him, insisted that her lunacy commenced at an earlier period, and it was the controversy in relation to this point which produced much of the expense attending the proceedings before the cause was transferred to this court. Fees paid to counsel for conducting this part of the controversy, cannot be allowed out of the estate. They must be paid by the parties who carried it on, for purposes interesting to themselves. The voucher No. 150, was, therefore, properly rejected by the Auditor in account D.

Nor can counsel fees be allowed for services rendered the parties in that part of the case which related to the person who should be appointed committee. If the parties interested, differ and litigate this point, they must do it at their own expense. Elisha Warford, and those who united with him, objected to the appointment of Richard C. Warford and his sister, and recommended Mr. Ellicott. They succeeded, but it does not fol-

low, that the counsel employed by them are to be paid out of the estate. The counsel fees referred to in the book of practice before mentioned, are fees paid by the petitioner in conducting the inquisition of lunacy under which the party is found to be a lunatic. In this case the petition for the writ *de lunatico inquirendo* was filed by Richard C. Warford, and not by Elisha Warford, the person upon whose recommendation, with others, Ellicott was appointed committee of the estate. The former has preferred no claim for an allowance, and the latter is entitled to none for legal services rendered in litigating the question of a proper person to be appointed. The law designates no person who shall be appointed committee, and, therefore, it is unlike the case of *Young ex parte*, 8 *Gill*, 285, where it was decided that an administrator, whose right to administer was successfully established, would be allowed for counsel fees. Upon this principle, the vouchers, Nos. 151 and 152, were properly rejected by the Auditor. It has been already stated, that the petition upon which the writ to inquire into the lunacy of Miss Colvin issued, was filed by Richard C. Warford, and that Elisha Warford and his associates interposed, not for the purpose of disputing her lunacy, but to show that it commenced at a period anterior to the time found by the jury, and the great mass of evidence contained in the record was directed to that point. The voucher No. 151, upon its face shows that it was for services rendered to Elisha Warford and his associates in ~~that~~ part of the controversy. It is apparent from the voucher, that the money was paid for services rendered upon the petition of *Elisha Warford and others against Richard C. Warford and another*, and had reference to the question which they were litigating respecting the period of the commencement of the lunacy of Rachel Colvin. The commission of lunacy which issued on the petition of Richard C. Warford had already been executed when Elisha Warford and others interposed, by their petition, and objected to the inquisition, because it did not carry the lunacy back to an earlier period. Surely costs incurred in a controversy of this nature cannot be regarded as costs of the commission. Voucher No. 152, appears to be for legal services

as to the appointment of the committee, and this for the reason before stated, cannot be allowed.

But, in my opinion, a credit should be allowed for the sums mentioned in voucher No. 153. They appear to have been paid for legal services rendered the committee in the discharge of his duty as such, in defending and protecting the estate of the lunatic, and are, therefore, proper and fair allowances.

The third exception of the receiver is against the charge in account D., of two-thirds of the costs of suit allowed him in account A., and it appears to me, the exception is well taken. Upon the face of the account they are stated to be the petitioner's costs, and come within the rule applicable to such cases.

The fourth exception refers to the charge in account D., of \$175, for rent of dwelling house of the deceased, Rachel Colvin, from the 25th of January, 1853, to the date of the account. She died on the 24th of January, 1853, and this fact was brought to the notice of the court by a petition filed by Mr. Ellicott, on the 2d of February following, in which, upon the grounds and under the circumstances therein stated, the order and direction of the court was asked to protect the committee from responsibility. By a previous order, he had been authorized to occupy the dwelling house, and he set forth in his petition that he could not afford to pay the rent such a house would command, and he desired to know whether, now that the lunatic was dead, he should continue to act as before, in the capacity of committee, until some person should appear authorized to take possession of the estate. Upon this petition no order was passed, the court thinking that the death of the lunatic put an end to the authority and office of the committee, and Mr. Ellicott, in his natural capacity, having no interest in the estate, it was thought a petition to meet the emergency should be filed by an interested party, and accordingly, on the 8th of February, 1853, a petition was filed by certain of the next of kin, and heirs at law of the deceased, in which, referring to, and adopting the statements contained in the petition of Mr. Ellicott, they pray for his appointment as receiver. Upon this petition, and in view of the urgency of the case as disclosed by the peti-

tion, an order passed the day following appointing Ellicott the receiver, and authorizing him to take charge and possession of the estate, and hold and manage it in all respects in his new capacity as he had done as committee. And under this order, in my opinion, he is not properly chargeable with rent for the short period which elapsed between its date and the revocation of his office of receiver, on the 19th of April, 1853. But from this latter date, he is chargeable, if he held and occupied the house. His right to continue in it, as he had done during the life of the lunatic free of rent, expired when he was removed from the office of receiver, and he must pay a fair rent if he did so continue.

The fifth exception is directed against the Auditor's account B., for not allowing the sum of \$120 paid by the committee to counsel. Not having the voucher before me, I cannot say whether this sum should or should not be allowed. But the views already expressed with regard to allowances of this character, will enable the Auditor to allow or reject it when the case is again before him. And this disposes of the exceptions of the committee and receiver.

The exceptions of David Warford to the allowance of vouchers Nos. 150, 151 and 152, have been disposed of in what has been said in the previous part of this opinion, and there remains only those of Richard C. Warford, administrator and receiver, which apply to the account E., stated at the request as alleged on Mr. Ellicott.

In this account, the receiver, Mr. Ellicott, is credited with the sum of \$320, upon vouchers numbered from 265 to 270, inclusive. The sums mentioned in vouchers Nos. 265 and 266, seem to me proper to be allowed, being for legal services rendered the committee as such in matters interesting to the estate. The sum of \$5, mentioned in voucher No. 267, is a proper allowance, but that of \$15, in the same paper, for services rendered in the Orphans Court of Baltimore County, cannot be allowed without further explanation.

No allowance can be made for the sums mentioned in vouchers Nos. 268, 269 and 270. It was certainly no part of Mr. Elli-

cott's duty as committee or receiver, to carry on a controversy in the Orphans Court about the appointment of an administrator, and if he thought proper to do so, the estate is not to be burdened with the expenses attending it. Nor is it proper to charge the estate with the cost of a litigation about the appointment of a receiver. If other persons thought proper to carry on a controversy of that description, well and good, but they must do so at their own expense. The committee and receiver, so long as he fills those offices, will be, and has been, allowed all proper and reasonable fees paid to counsel for advice and assistance in the discharge of his duty, and in aiding him to preserve and defend the estate. But beyond this he cannot go. If he chooses to carry on a litigation for his office, he must pay the costs out of his own pocket. He holds the office at the discretion of the court, and should a dispute arise in regard to the propriety of continuing him in it, or appointing some one in his stead, the controversy must be conducted by parties interested in the estate, and at their own expense.

If, to be sure, the official conduct of the committee is assailed, he may defend it, and if he does so successfully, the assailant will be made to pay the costs, but fees to counsel, even in that case, should not, as I apprehend, be thrown on the estate. But here Mr. Ellicott was unsuccessful. He was removed from the office of receiver, and hence it follows, he was wrong, in the judgment of the court, in resisting the application of the party who proceeded against him. To allow him to throw his counsel fees on the estate under such circumstances would, I think, be manifestly improper.

I am not aware of any objections of the parties which have not been considered and decided, and shall send the case to the Auditor to state accounts in pursuance of the views hereinbefore expressed.

BENJAMIN F. HAINES AND OTHERS, }
 vs. } DECEMBER TERM, 1853.
 MORDECAI HAINES AND OTHERS. }

[PARTITION OF REAL ESTATE—SPECIFIC PERFORMANCE.]

In a proceeding for the partition of the real estate of an intestate, two of his children, to whom he had in his lifetime given certain portions of his estate, and of which they had taken possession, and made expensive improvements thereon, under the promise or agreement of their father that the property should be theirs, were made *defendants*, and they insisted that the land so claimed and possessed by them was not liable to partition. **HELD—**

That under the case as presented, the parties claiming the lands being *defendants*, and not asking the active interposition of the court in their favor, partition of these lands should not be decreed.

A much weaker case will constitute a good defence than would be required if the parties were complainants, asking the active interposition of the court in their favor; they are not bound to make out a case which would entitle them to the specific performance of the agreement set up in their answers. To constitute a valuable consideration, it is not necessary that money should be paid; if it be expended on the property on the faith of the contract, it constitutes a valuable consideration.

Money expended in the improvement of land on the faith of the contract constitutes a consideration on which to ground a claim for specific performance.

A court of equity will not decree the specific performance of a mere voluntary agreement.

[The facts of this case are sufficiently stated in the following opinion of the Chancellor, which was delivered on the 22d of February, 1854.]

THE CHANCELLOR:

This is a bill filed by the complainants in February, 1849, for a partition of the real estate whereof Nathan Haines died seized in the year 1848.

Although the deceased executed a will, as stated in some of the answers, it was not attested so as to pass real estate, and as to that, therefore, he died intestate, and the question presented by the proceedings, and to which the argument made

before me has been exclusively directed, has reference to the validity of alleged dispositions of his land made by him in his lifetime.

Nicholas Hardy, and Eleanor his wife, one of the daughters and heirs at law of Haines, allege in their answer, that about the year 1843 he gave to them, jointly, in fee simple, about one hundred and seventy acres of land, and put them in possession thereof, upon which they have expended large sums in improvements of various kinds, having built a dwelling house and other houses, and rendered the soil more productive by lime. That they have exercised every act of ownership over the land, with the knowledge and approbation of said Haines, who encouraged them in making expenditures thereon, and constantly and always admitted the title thereto to be in them.

They also set up an agreement in writing, signed and sealed, dated the — day of July, 1845, by which Haines bound himself to convey the land claimed to them. This agreement is as follows:—"Received of Nicholas Hardy five dollars to me in hand paid for a part of the land conveyed to me by Walter Worthington, and now laid off by John Brown, containing one hundred and seventy acres, more or less, and which I promise and oblige myself, my heirs or assigns, to convey to the said Nicholas Hardy, and Ellen his wife, the said land to them, their heirs or assigns, in fee, and of which I have given them, the said Nicholas Hardy, and Ellen his wife, possession of the same. In testimony whereof I have hereunto subscribed my hand and seal this the — day of July, 1845."

Signed,

"NATHAN HAINES.

{ SEAL. } "

And the said Hardy and wife admit that said land was given and transferred to them as their entire interest in the whole real estate, of which said Nathan Haines died seized and possessed.

The defendant, Mordecai Haines, in like manner, in his answer, says that his said deceased father, Nathan Haines, in the year 1840, gave him the farm on which he now resides, containing about one hundred and forty-one acres, and placed him in possession thereof, upon which he has been residing ever

since, and upon which he has expended large sums of money in improvements, with the knowledge and under the advice of his father, and his assurance that the title was in him by virtue of the gift and possession as aforesaid. And this defendant, assuming his title to said land to be good, disclaims all interest in the residue of the real estate of his father.

Pressed for time, and seeing no advantage in dwelling at length upon either the facts or the law of this case, I shall proceed very briefly to state the grounds upon which I have formed the opinion that the defendants, Hardy and wife, and Mordecai Haines, as the cause is presented, have succeeded in showing that a partition or sale of the land claimed by them should not be decreed.

They are defendants here, and it cannot be necessary to refer to authorities to show that a much weaker case will constitute a good defence than would be required if they were complainants, asking the active interposition of the court in their favor. A stronger illustration of this principle could not easily be found, than in the case of *Crane vs. Gough*, recently decided by the Court of Appeals, upon an appeal from this court, and reported in 4th *Md. Rep.*, 316. It is a familiar and acknowledged principle, as shown in 3 *Md. Ch. Decisions*, 133, and the authorities there cited.

These defendants, therefore, as I conceive, are not bound to make out a case which would entitle them to ask for the specific performance of the engagement set up in their answers. They do not ask this court to decree them a conveyance, or to do anything for them. All they require is, that the land which they claim may not be partitioned or sold. In other words, they ask to be let alone, and this request, under the circumstances of the case, I think, should be accorded to them.

There can be no doubt, I think, that these defendants, Hardy and wife, and Mordecai Haines, took possession of these parcels of land, with a clear and distinct understanding, founded on the positive promise of Nathan Haines, that they were to have them in absolute title, and that they, and particularly Hardy, made large and expensive improvements upon them, with the knowledge and consent of the father, and upon the faith of his engagement to give them the lands.

It is certainly true, that a court of equity will not decree the specific performance of a mere voluntary agreement, and if these parties were simply volunteers, and were here asking to have the agreement specifically performed, they could not be gratified. But they are not here asking the aid of the court in their favor. They have been brought here as defendants, and merely ask the court to leave them in possession of the property which they have held for many years, which they have improved at considerable expense, and which they had abundant reason to think had been given to them.

The difference between *King's heirs vs. Thompson and wife, 9 Peters, 204*, in the attitude in which the parties appear before the court, is in favor of these defendants. There the parties claiming under the proposed grant of George King, were complainants, seeking the enforcement of the contract in which they would have been successful if the terms could have been established with sufficient certainty. The circumstances of that case and this are very much the same, and yet the Supreme Court said that it could not be considered voluntary. There was not only a good consideration, that of natural love and affection, but a valuable one. To constitute a valuable consideration, it is not necessary that money should be paid, but if, as in this case, it be expended on the property on the faith of the contract, it constitutes a valuable consideration.

The same principle was established by the case of *Shepherd vs. Bevin et al, 9 Gill, 32*, where, after speaking of the inclination of the courts to deal favorably with agreements made by a parent with a child, and declaring the agreements of that kind will be supported by a slight consideration, it was held that money expended in improvement of land on the faith of the contract constitutes a consideration on which to ground a claim for specific performance.

Upon the authority of these two cases, and especially of the latter, to which this court is bound to defer, there can be no doubt, I think, that if these parties, Hardy and wife, and Mordecai Haines, were here as complainants, asking for the specific execution of the agreement of Nathan Haines with them, and

they could show its precise terms, this court could not reject their application. But they are not here as complainants, and all they ask is, that the court will not interfere actively against them, and take from them property of which they have been long in possession, and upon which they have made expensive improvements, upon the faith of a promise or agreement that the property should be theirs.

No one, of course, can dispute the right of Nathan Haines to dispose of his property among his children according to his own pleasure, unless, indeed, such disposition should be in conflict with the claims of creditors, and their rights cannot be affected by this proceeding in any way. The case in *Peters*, before referred to, shows that money expended under a belief that the property belonged to the party making the expenditure, should be regarded as constituting an equitable lien, and though the contract, for the want of precision in its terms, could not be specifically enforced, the property was ordered to be sold, and the proceeds applied in the first place to the payment of the sums expended, and the balance, if any, paid over for the benefit of the creditors of the father of the female complainant, and in further proof of the favor with which the complaints were considered by the Supreme Court, they were not held responsible for the rent, either during their own occupancy, or whilst it was held by tenants.

But it is not now the purpose of the court to intimate any opinion with respect to the rights of the creditors of Nathan Haines, if his personal estate should be insufficient to pay his debts, as is stated in the answer of Hardy and wife, and Mordecai Haines. The creditors are not here, and, of course, are not to be prejudiced by the reasoning or judgment of the court in this case.

The question, and the only question now to be determined is, whether, in a proceeding for the partition of the real estate of Nathan Haines, among his heirs at law, the parcels of land which Hardy and wife, and Mordecai Haines, are and have been in the possession of, claiming the same as their own, and upon which they have expended large sums of money, under

the honest conviction that their title was good, shall be subject to such partition. There certainly would be no equity in so doing, especially as the property which remains to be divided between his two other children and their representatives, is nearly equal in value to the parcels held and claimed by Hardy and wife, and Mordecai Haines, due allowance being made for the moneys expended by them in improvements.

It does not clearly appear, from the return of the commissioners, whether the lots, Nos. 1 and 2, comprehend the lands of which these parties have been in possession. They state them to be the lands claimed by Mordecai Haines and Nicholas Hardy, and Eleanor his wife, and it is presumed they are the same parcels of which they have respectively been in possession, and upon which they have expended their money in improvements. If this be so, my opinion is, that they are not subject to partition among the heirs at law of Nathan Haines, and that the lot, No. 3, remains only to be divided between the two other heirs, or their representatives.

The commissioners state in their return that the land cannot be divided among the parties without serious loss to them all, and that it cannot be divided into more than four lots without materially reducing its value, and they give their reasons for this opinion. But they have only divided it into three parts, and it does not appear whether the third lot, which, (assuming lots Nos. 1 and 2 to have been held as aforesaid,) in my opinion, is the only part subject to partition, is capable of being divided into two parcels. That is, between the remaining two heirs of the deceased, excluding Mordecai Haines and Hardy and wife. It will, therefore, be necessary to remand the commission with directions to make partition of the real estate whereof the said Nathan Haines died seized into two parts, according to the views herein expressed.

ROBERT J. BRENT, for Complainants.

WILLIAM H. G. DORSEY, for Defendant.

FREDERICK J. DUGAN
 BY HIS COMMITTEE,
 vs.
 JOHN S. HOLLINS AND OTHERS.

DECEMBER TERM, 1853.

[CONSTRUCTION OF WILL—CONTRIBUTION—LEGACIES.]

A TESTATOR by his will, executed in 1832, in order to place his sons upon an equality with his daughters, gave to each a pecuniary legacy to be paid by his executors "by the sale of his bank or other stocks." HELD—

That this equality had reference to the state of facts existing at the date of his will, and no subsequent fluctuation in the value of the property which the testator may have previously given his children can influence this bequest, either to diminish or increase it.

A gift of a house to one of his sons subsequently to the date of the will, is not an ademption, *pro tanto*, of the pecuniary legacy given by the will; one of the exceptions to presumptive ademption is where the testamentary provision and the subsequent advancement are not *ejusdem generis*.

These legacies to the sons are payable out of the personal estate alone, and that being insufficient, they have no right to resort to the real estate in the hands of the devisee.

A testator directed "his funeral expenses and debts to be paid out of whatever part of his estate his executors shall think proper." HELD—That if this clause confers upon the executors the power to sell the real estate, it only authorizes them to do so for the purpose of paying funeral charges and debts.

The real estate is never charged with the payment of legacies, unless the intention so to charge it is expressly declared, or is fairly and plainly to be inferred from the terms of the will.

A testator declared by his will, that if any claim was made against his estate on account of certain notes drawn by him in favor of his daughters or their husbands, his executors should charge the sums paid by his estate on account thereof to his daughters. These notes the testator paid in his lifetime, and lived more than two years thereafter without changing his will. HELD, that the provision made in his will for his daughters could not be diminished on account of the payment of these notes.

At common law upon partition between coparceners there is an implied warranty that if either loses any of his share by eviction, on account of defect of title in the ancestor, the party evicted may enter upon the others and defeat the partition, or by proper proceedings, may obtain recompense for the part lost.

A deed of partition was executed between several parties without covenants, and the portion assigned to one was made responsible for the payment of a decree against the ancestor. HELD—That he had a right to call upon the other parties in chancery, to contribute their proportions of the money paid by him in discharge of this decree.

[The facts of this case are sufficiently stated in the Chancellor's opinion, which was delivered on the 26th of January, 1854.]

THE CHANCELLOR:

The proceedings in this case, which are voluminous, need not be recited, the questions in controversy depending upon the proper construction of the will of Cumberland Dugan, deceased, who died on the 1st of November, 1836, and upon the legal effect of certain facts admitted by the parties, as appears by their written agreement.

The testator was twice married, and by his second marriage had four children, to wit, Hammond Dugan, Frederick James Dugan, Rebecca Hollins and Cordelia Margaret Hollins, and with reference to these in the 14th clause of his will, he says: "And whereas, it is my wish and desire, that my four children (naming the above four) shall be placed by me as nearly as possible on an equality in the division of my estate under *this present will*, and under such conveyances, gifts, &c., as I may have made to them respectively, and also having regard to their respective situations; and whereas, the Washington Cotton Factory, hereinbefore devised, to the use of my two daughters, Rebecca and Cordelia Margaret, was purchased by me for the sum of \$27,500, I, therefore, order and direct, that as early after my decease as may be practicable, my executrix and executors shall sell such portions of my bank and other stocks as shall produce the sum of \$27,500, and pay therefrom, to my son, Hammond Dugan, the sum of \$13,750, and to my son, Frederick James Dugan, the sum of \$13,750."

The will was executed on the 5th of October, 1832, and letters testamentary were granted to Margaret Dugan, the widow of the testator, in December, 1836, soon after his death.

These sums not having been paid, the plaintiff in the present bill, among other things, seeks to recover from the daughters of the testator by a sale of the real estate devised to them and their children, first the legacy so bequeathed to him, and secondly, his one-third of the sum bequeathed to his brother Hammond, now deceased.

I concur with the complainant's counsel in thinking that the equality spoken of by the testator, had reference to the state of the fact as it existed at the date of the will, and that any fluctuation in the value of the property, which the testator may have previously given to his children, subsequently to that date, can have no influence upon the bequest. The testator has said, that to place his sons upon an equality with his daughters, there shall be paid to each of the former, the sum of \$13,750, to be raised by his executors, by the sale of his bank and other stocks, and I apprehend it would be an unwarrantable assumption of authority in this court to say, that because there has been a change in the value of the property previously given by him to his children, the legacies which in his judgment were necessary to produce equality shall not be paid, or shall be reduced.

If this court would be justifiable in reducing the sums to be paid the sons, because the property previously given by the testator to his children may have appreciated or depreciated in value, it is not seen why it might not *increase* these sums, if such increase should appear to be necessary with reference to the changed value of the property. If present equality is to be attained, and that can only be accomplished by increasing or decreasing the sums to be paid to the sons, it would be difficult to maintain that the court may do the one, but is prohibited from doing the other.

Neither do I think this court is at liberty, for the purpose of reducing the sum to be paid either of the sons, to take into consideration any property which the father may have given them, or either of them, in his life time, between the date of his will and his death, as it is to be presumed if such gift had altered his intention with regard to the pecuniary legacies bequeathed to his sons, he would have made the necessary alteration in his will.

It has not been contended, nor could it be successfully, that the gift of a house to the complainant, by his father in his lifetime, was an ademption, *pro tanto*, of the pecuniary legacy bequeathed him by his will, one of the recognized exceptions to presumptive ademption being where the testamentary provision

and subsequent advancement are not *ejusdem generis*. 1 *Roper on Legacies*, 261.

But though I agree with the complainant in thinking that the amount of the pecuniary legacies bequeathed to him and his brother Hammond, is not to be reduced, because the property previously advanced by him to them may have appreciated in value, subsequent to the date of his will, it does not follow that they have a right to resort to the devisees of the real estate, in case the personalty from any cause should prove inadequate. By the clause in which these legacies are given, the executors are to sell his bank or other stock to raise money for their payment, and no expression is used from which, by implication, the power to sell the real estate can be deduced.

No argument, as I think, in favor of such a power for the purpose of paying these legacies, can be drawn from the second clause of the will, because, however extensive a power over his estate that clause may be supposed to confer upon his executors, its exercise is expressly limited to the duty of paying *his funeral expenses and debts*. Its language is, "as to my worldly estate, which a bountiful providence has been pleased to bestow upon me, I now dispose of the same in manner and form following, that is to say: *Imprimis*, I order and directed my funeral expenses and all my just debts shall be paid out of whatever part of my estate my executrix and executors, or a majority of them, shall think proper." If, therefore, this clause can be regarded as conferring upon the executors the power to dispose of the real estate of the testator, it would seem to be clear that it goes no further than to authorize them to do so for the purpose of paying funeral charges and debts, and can by no possible construction, enlarge the power given them by the 14th section, which limits their authority to the sale of bank or other stock for the payment of the legacies.

The cases are numerous and uniform in this state, and elsewhere, establishing the principle that the real estate is never charged with the payment of legacies unless the intention so to charge is expressly declared, or fairly and plainly to be inferred from the terms of the will. *Stevens vs. Gregg*, 10 *Gill & Johns.*,

143, and the cases there referred to. And in that case, it was adjudged, that a legacy of \$500 to each of the testator's two grandsons, to be paid by his executor, was not evidence of an intention to charge the real estate in the hands of the devisee with the payment of the legacies, the court in their opinion saying, that the legatees and devisee appear to have been alike the objects of the bounty of the testator, and it not appearing to have been his intention to encumber his lands with the payment of the legacies, and there being no evidence that the executor, who was the devisee of the real estate, had wasted or misapplied the personalty, the legatees were adjudged to have no claim upon the proceeds of the real estate, and, consequently, the personalty being insufficient, they were disappointed.

The case now before this court, it is thought, is not distinguishable in principle from the case referred to. It is the case of a pecuniary legacy not chargeable upon the real estate, and in which the personalty being insufficient, the legatee must bear the loss, having no right to resort to the real estate in the hands of the devisee, who, with himself, is equally the object of the bounty of the testator.

The general rule of marshalling assets, as explained and applied by the Court of Appeals, in the case of *Chase vs. Lockerman*, 11 *G. & J.*, 185, furnishes no authority for throwing these legacies upon the real estate devised, or for compelling the devisees to contribute. Other cases were referred to in the argument, but as they simply reaffirm the rule established in *Stevens vs. Gregg*, and *Chase vs. Lockerman*, it is not thought necessary to cite them.

These views dispose of the first and second claim made by the complainant, and show that, in my opinion, he cannot have recourse to the real estate devised to the testator's two daughters and their children, for the payment of the sums of money bequeathed to him and his brother Hammond Dugan in the 14th clause of the will. These legacies were payable out of the personal estate of the testator, and out of that alone.

The complainant's third claim, as enumerated in his statement filed on the 18th instant, is founded upon the 15th clause

of the will, and the facts in connection with it contained in the agreement filed on the 8th of June, 1853.

In this clause, the testator, after bequeathing to Isaac McKim, upon certain trusts, parcels of goods and chattels contained in a deed of trust previously executed by him to John Smith Hollins, recites that he was security on sundry negotiable notes, drawn by Robert S. Hollins, amounting to about \$10,000, more or less, and that his daughters, Rebecca and Cordelia Margaret, or either of them, may hold a note or notes of his, drawn in their favor, or in favor of either of them, says, "now my will and desire is, that the foregoing promissory notes, any, or either of them, is to be no charge whatever on my estate, but that if any claim whatever is made on my estate in respect of said notes, or either of them, so drawn or endorsed by me, then, and in that case, my said daughters, or the one making or occasioning such demand or charge, shall cease to receive and be entitled to receive any share or dividend from my estate so devised to their use respectively, until the said note or notes be entirely released, and all liability of my estate for them, or any part of either of them, respectively, be wholly determined. And should it so happen, that my said estate should be made responsible for any sum whatever, on account of said notes endorsed or drawn by me, for my said daughters, or either of their said husbands, then, and in that case, I order and direct that whatever sum may be paid by my estate on said account, shall be charged by my executrix and executors against my said daughters, or against such one as may have occasioned any such charge on my estate."

It is conceded, that the testator's daughters have made no charge or claim against his estate on account of notes held by them, or either of them, and the statement of facts agreed on, shows that John S. Hollins and Robert S. Hollins, his two sons-in-law, who were partners in business, failed in the year 1833. That Robert S. Hollins applied for the benefit of the insolvent laws in 1834, and was discharged, and that John S. applied and was discharged under said laws in June, 1840, and that Cumberland Dugan, the testator, in his lifetime, filed his claim against the insolvent estate of Robert S. Hollins on account

of payments and advances of said Dugan for him, said Hollins. And the agreement further shows, that the notes endorsed by the testator for the Messrs. Hollins, were from time to time renewed for their accommodation, until the year 1834, when, after their failure, the renewals then maturing were retired, and constitute the vouchers of the claim of the testator filed in the insolvent case of Robert S. Hollins, and that the dividend allowed on this claim, amounting to \$910 54, was received by his executrix after his death.

I am of opinion, that it sufficiently appears from the admissions and the proceedings in the cause, that the testator paid the notes endorsed by him for the Messrs. Hollins in his life, in the years 1833 and 1834, and there is not, as I think, any sufficient proof connecting the transaction with the Franklin Bank with the payment in such way as to show that the money to pay the notes, was borrowed from that institution, even if that would make any difference in the law affecting the case, which may be doubted. The notes were certainly paid by Dugan, the testator, in his lifetime, and in respect of such payment, he presented himself as creditor of the insolvent estate of Robert S. Hollins, and it does not appear to me to be material whether he borrowed the money for the purpose from the bank, and that the debt to the bank was paid after his death by his executrix.

Mr. Dugan lived two years after he paid these notes, and made no alteration in his will. Though the language of the 15th clause is in some respects not free from ambiguity, it seems to me very clear, that when the testator speaks of charging his daughters with the sums which may be paid by his estate on account of the notes referred to, he meant sums which might be paid after his death. The charge was to be made by his executors, which would seem to refer to moneys paid by them after his death.

It can scarcely be supposed he intended that his executors should charge his daughters with moneys which he might pay in his lifetime, for them or their husbands, because he was quite competent to do that himself, and no reason exists, or is shown,

why he did not do so if he designed it. The more reasonable presumption is, that seeing his sons-in-laws had failed in their business and become insolvent, he was not disposed to diminish the provision made for his daughters by pressing this charge against them, and this presumption is strengthened by the fact, that after the execution of his will, he paid the sum of \$3400 for a house which he gave to the complainant.

I am, therefore, of opinion, that the complainant is not entitled to recover from the defendants any thing on account of payments made by the testator, as security for Robert and John S. Hollins, mentioned in the 15th clause of the will.

The 4th item of claim set up by the complainant, is founded upon the payment by him of a large some of money in discharge of a decree obtained by *John S. Gittings et al* in 1841, under the circumstances stated in the proceedings.

The decree was rendered in 1841, and affirmed on appeal in 1845. By it, Mr. Gittings and others, were held to be entitled to a parcel of property which had been devised by the testator to the two sons of his said two daughters, valued at \$11,000, and the defendants in that suit, were decreed to pay a large sum of money on account of the rents and profits of said property. And the facts agreed on, show, that after the decree had been affirmed, and pending subsequent proceedings to make the personal and leasehold property bequeathed by the testator, and then in the possession of the complainant, responsible for the money so due, the complainant, on the 18th of February, 1847, paid the balance due, with costs, and the bill in this case seeks to make the defendants refund to the complainant a portion of this payment.

The proceedings further show, that in the year 1844, a partition was made of certain portions of property which had been conveyed by Margart Dugan and Sarah Moore, to Frederick James Dugan and William McKim, trustee, and by the said Margaret Dugan to the same parties. The property was divided into three equal parts, whereof one-third was assigned to the said Frederick James Dugan, one-third to William M'Kim, trustee of Rebecca Hollins, and the remaining one-third to the

same party in trust for Cordelia M. Hollins, and this partition was by a deed executed interchangeably by Dugan and wife, McKim, the trustee, Rebecca and Cordelia M. Hollins, carried into effect; the parties respectively conveying each to the other according to the assignment of the commissioners appointed to make the partition. It was the property in fact which was assigned to Frederick James Dugan by this partition, which it was the object of the supplemental proceedings in the case of Gittings and others, to render responsible for the payment of the rents and profits decreed to be paid them.

So far as this item of claim is concerned, it appears to me, the merits as well as the law of the case, are with the complainant. The rule at common law is well settled, that upon a partition between coparceners there is an implied warranty that if either loses any of his share by eviction on account of defect of title in the ancestor, the party evicted may enter upon the others and defeat the partition, or by proper proceedings may obtain recompense for the part lost. The case of *Morris vs. Harris*, 9 *Gill*, 20, shows this to be the common law doctrine, though in that case the rule was not applied, the implied warranty being controlled by the express covenants between the parties.

In this case, however, there are no covenants in the deed executed by these parties which can control the covenant arising from legal implication, and I can see no reason, in justice or law, why the complainant should not be entitled to call upon the parties, between whom and himself the partition was made, for contribution. Undoubtedly, upon this point, the equity of the case is with him, and, I am of opinion, he has a right in a Court of Chancery to call upon the other parties to contribute their fair proportions of the money paid by him in discharge of the decree in favor of Gittings and others, mentioned in the proceedings.

By the last clause of the will of Cumberland Dugan, he bequeathed all the rest and residue of his property, real, personal and mixed, partly by specific description, and partly in general terms, to his four children, Rebecca Hollins, Cordelia Margaret

Hollins, Hammond Dugan and Frederick James Dugan, the slaves given to the daughters being in trust. And it is alleged, and the allegation not seriously if at all denied, that some property embraced in this residuary clause remains to be distributed. Especially it is said, that ground rents, amounting to \$900 per annum, in which the testator's widow (now deceased) had a life estate and which constituted a part of the residue, yet remain to be distributed. And the complainant insists that no further distribution shall be made, including the amount in the hands of the administrator of Margaret Dugan until he is paid the sum due to him.

It being the opinion of the court that the complainant is entitled to contribution in respect to the amount paid by him in satisfaction of the decree obtained by Gittings and others, an account must be stated for the purpose of ascertaining how much he is entitled to, and it would seem proper in the mean time, that no further distribution should be made, or insisted on by the complainant. The defendants have, to be sure, excepted to the averments of the bill, so far as this claim for contribution is concerned, but it will, I think, be found upon examination, that the bill does distinctly rest a part of the claim made by it upon this very ground. That it avers every fact essential to the claim, and that it is not consequently obnoxious to exceptions on this account.

The case will, therefore, be sent to the Auditor to state the necessary accounts.

T. P. SCOTT and ALEXANDER, for Complainants.

BROWN and BRUNE, for Defendants.

ALFRED W. THOMPSON AND
JONATHAN A. WATERS ET AL
vs
MARGARET A. DORSEY ET AL.

} SEPTEMBER TERM, 1853.

[PARENT AND CHILD—LIMITATIONS—ACT OF 1849, CH. 224—GIFTS INTER VIVOS
OR MORTIS CAUSA.]

A FATHER is bound to educate and maintain his infant child, and if another person performs this natural duty for him, with his knowledge and consent, the father is liable to pay a reasonable sum to such person.

To such a case the Statute of Frauds has no application, for the debt is the debt of the father and not of the son, and therefore is not an attempt to charge him with the debt of a third person.

Where the real estate of an intestate is sold for the payment of his debts, the operation of the Statute of Limitations, so far as the heirs at law are concerned, is suspended for the space of eighteen months from the death of the intestate, by the act of 1849, ch. 224.

A party shortly before his death delivered a note due him to a friend, with directions to collect and apply it to certain purposes for the benefit of his wife, but died before the money collected was so applied. HELD—that this does not amount to a gift *inter vivos* or *mortis causa*, and the proceeds of the note belong to the estate of the deceased.

[The bill in this case was filed by creditors against the widow and administratrix, and heirs at law of Rinaldo Dorsey, deceased, charging the insufficiency of the personal estate to pay his debts, and praying for an account from the administratrix, and for a sale of the real estate for that purpose. After answer admitting these allegations, a decree for a sale was passed, and an account ordered. The property was sold, and the proceeds brought in, and on the 22d of February, 1853, a petition was filed in the case by John Warfield of Joshua, Margaret G. Warfield, and Ann Pierse, setting up several claims against the estate, that of said John Warfield being principally for board of the son of the intestate, from the 13th of September, 1839, to the 13th of May, 1850, at \$50 per annum, making \$533 33. The other claims, and the proof in support of them, are sufficiently stated in the Chancellor's opinion. The petition further charges that the said administratrix has omitted to return several debts, claims, &c. due the estate of her intestate, especially a note of G. Slothower for \$80, payable to the intestate.]

Margaret A. Dorsey, the administratrix, in her answer denies the validity and existence of these claims, and she, as well as the creditor's complainants, plead the Statute of Limitations thereto. In reference to the note of Slothower, she states that the same was delivered by the deceased some weeks before his death to George L. Stockett, to be delivered to one Baker Dorsey for collection through the bank, with express directions to receive the same and to apply it to certain dental operations to be performed on the teeth of respondent. That said note was delivered to said Dorsey, but that deceased departed this life before the money was so applied, and that the same remains in bank to this day, but she claims that said sum does not belong to the estate of the intestate, but by his express directions so given to the said George L. Stockett, was applicable to the purpose designated, and she claims the same, but is willing to abide by the order of the court in this behalf.

The testimony of John Warfield in relation to the claim of Margaret G. Warfield set up by the petition was, that sometime in the year 1849, not more than eighteen months before the death of Rinaldo W. Dorsey, he called upon Seth Warfield and witness to value a negro girl named Maria, which he had agreed to sell to Margaret G. Warfield at such price as he should agree upon, which was \$75. R. W. Dorsey was owing money to Margaret G. Warfield, and the \$75 was to be credited on her account against him, and witness wrote the credit on the back of a due bill about the time of the sale.

The testimony of Seth Warfield as to the same claim is that witness was called upon by R. W. Dorsey to value the negro girl which he had agreed to sell to his aunt, Margaret G. Warfield, at such price as John Warfield and witness should say she was worth; he valued her at \$75 or \$80. Witness is not certain about the mode of payment, but to the best of his recollection, Dorsey said he was owing his aunt money. Whether the girl was in payment of the whole or not, witness cannot say. The sale took place witness thinks sometime in the year 1849.

The testimony of Margaret G. Warfield in relation to the claim of Mrs. Ann Pierse is, that witness was present at the time

Dorsey renewed a note previously given to Mrs. Pierse, when he told the latter that he could not ascertain the amount of other moneys which he owed her without a reference to his books, which were at Dr. Worthington's. He came over a few days afterwards for the purpose of settling the open account, but stated that he had mistaken the key and could not get his books. He promised to go to Baltimore to see Mrs. Pierse and give his notes for the amount, but he never saw Mrs. Pierse afterwards. These moneys she had given him an order on Mr. Charles F. Mayer to receive for her.

The other testimony is sufficiently stated in the opinion of the Chancellor delivered upon the hearing of this petition.]

THE CHANCELLOR:

This case is submitted upon the petition of John Warfield of Joshua, and others, filed on the 22d of February last, the answer thereto of Margaret A. Dorsey, administratrix of Rinaldo W. Dorsey, and the proof in relation to the claim set up by the petitioners, taken under the order passed upon said petition.

The claim of John Warfield seems to me to be sufficiently proved. A father is bound to educate and maintain his infant child, and if another person performs this natural duty for him with his knowledge and consent, the father is liable to pay a reasonable sum to such person. The proof is conclusive to show that John Warfield did board the son of Rinaldo W. Dorsey, and that he knew and approved of it. The Statute of Frauds has no application to such a case. The debt is the debt of the father and not of the son, and therefore it is not an attempt to charge him with the debt of a third person.

But limitations are pleaded, and this defence covers and defeats a large part of the item of board. The charge for board commences on the 13th of September, 1839, and ends on the 13th of May, 1850. Limitations, therefore, bars the whole charge except that portion which accrued within three years from the time of filing the petition on the 22d of February, 1853. But with regard to the heirs at law, the operation of the statute is to be suspended for the space of eighteen months

from the death of the intestate, as provided by the act of 1849, ch. 224. Therefore, the period of eighteen months from the 15th of March, 1850, when, according to the testimony of Dr. Worthington, Mr. Dorsey died, is not to be computed, so far as the real assets are concerned. The item for cash paid Peter Gorman is barred, and must be rejected, so far as relates to the creditors who have relied on limitations.

The claim of Margaret G. Warfield appears to me to be proved, and the depositions of John Warfield and Seth W. Warfield remove the bar of the act of limitations. Rinaldo W. Dorsey acknowledged his indebtedness to Margaret G. Warfield in 1849, and the petition was filed in February, 1853, four years subsequently, but as with reference to the proceeds of real estate the operation of the statute must be suspended for the period of eighteen months from the death of the intestate the claim is saved.

The claims of Ann Pierse are proved. That founded on the single bill, it is admitted, is not barred. But in stating the claim of Ann Pierse, the Auditor will only charge the estate of the deceased, Rinaldo W. Dorsey, with the amount of the single bill, and the sums which appear by his own receipts to have been received by him of Mr. Mayer. Margaret G. Warfield was present when the single bill was executed on the 1st of October, 1849, when Dorsey admitted he owed Mrs. Pierse other moneys. This protects the claim from the plea of limitations as to the real estate, in view of the operation of the act of 1849, before referred to.

There is nothing in the proofs showing error in the administration accounts, or requiring the administratrix to be debited with any further sum except the amount received on the note of Slothower, which, according to the answer of the administratrix was delivered by the deceased to George L. Stockett. The circumstances stated in the answer do not amount to a gift *inter vivos* or *causa mortis*, and consequently the money collected on that note and now remaining in bank, must be accounted for.

J. T. B. DORSEY, for Petitioners.
STOCKETT, for Respondents.

R. W. GILL, ADMINISTRATOR OF SOMERVILLE PINKNEY AND HENRIETTA M. HALL, vs. WILLIAM D. CLAGETT.	}	SEPTEMBER TERM, 1853.
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[PRIORITY OF ASSIGNMENT—ASSIGNMENT OF A SUIT—CONSTRUCTION OF WILL.]

A SUIT in this court for the recovery of a sum of money was in October, 1835, for a valuable consideration assigned by the plaintiffs, and the assignee had the case entered for his use upon the docket of the Court of Appeals, where it was then pending upon appeal, and in January, 1836, had the same cause marked for his use upon the docket of this court. The cause being subsequently remanded for amendment and further proof, an amended bill was filed in 1838, when the entry for the use was not marked upon the docket, and has not been since. **HELD—**

That this assignee was not guilty of laches or neglect, and is entitled to the proceeds of the suit in preference to a party who received an assignment of the same in 1841 or 1845, to secure a pre-existing indebtedness.

A party who has obtained the assignment of a suit or decree, has done all which can be reasonably required of him when he has caused the entry to his use to be made; he is not bound to see that the entry to his use is duly copied whenever the cause is transferred from docket to docket.

A promise to pay a creditor out of the fruits of a pending action, and a promise to assign the action to him are very different things; in the former case credit is given to *the party* making the promise; in the latter, a *specific security* is looked to.

A testator devised certain lands in trust for "the use and benefit" of his daughter during the life of her husband, directing the trustees not to pay the proceeds to him, but any "receipts or writings witnessing the payment of such proceeds or profits to his daughter shall be a sufficient discharge of said trustees." **HELD—**

That the daughter was entitled during the life of her husband to receive the proceeds of the trust estate, and having the power to receive, she had the correlative power to dispose of them, at least for the support of herself and children.

[The devise in the will of Joseph W. Clagett in favor of his daughter, Henrietta Maria Hall, referred to in the latter part of the following opinion of the Chancellor, is as follows:

"*Item.* I give and devise unto my son, William D. Clagett, and my son-in-law, Charles Hill, and their heirs forever, one-half of all my lands in Calvert county, in trust to and for the use and

benefit of my daughter, Henrietta Maria Hall, and her children, and my will and desire is that the said trustees shall not be compelled to pay into the hands of Richard Hall, the husband of the said Henrietta Maria Hall, any part of the proceeds of the said land, but that the same shall remain in the hands of said trustees during the life of the said Richard Hall, and that any receipts or writings witnessing the payment of such proceeds or profits to my said daughter, Henrietta Maria Hall, shall be a sufficient discharge of said trustees, and I do hereby authorize and empower the said trustees, or the survivor of them, to sell and dispose of the said land at any time they or the survivor of them shall think proper, and to invest the proceeds of such sale in other land or in bank stock, as they or he may deem most advantageous. And I do hereby authorize and empower the said trustees to convey the said land in case they should think proper to sell the same to the purchaser or purchasers thereof by a good and sufficient deed or deeds."

The other facts in the case are sufficiently stated in the Chancellor's opinion, delivered on the 7th of November, 1853.]

THE CHANCELLOR :

The present controversy arises upon the petition of George H. Stewart, executor of the late William Stewart, filed on the 22d of January, 1846, and relates to the disposition of the money paid into court under the order of the 30th of September last, being the proceeds of the note of William D. Clagett, given to the late Somerville Pinkney, acting as solicitor and agent of Henrietta M. Hall, one of the complainants in the original suit.

The proceedings in that case, which will be found reported in 9 *Gill and Johns.*, 80, need not be recapitulated here, but its results and the compromise and settlement which was finally made, are sufficiently explained in this case, a report of which will be seen upon reference to 2 *Md. Ch. Decisions*, 151.

Whilst this latter case was in progress, the present petition was filed, and by it the petitioner claims a portion of the money upon the ground that on the 22d of October, 1835, the said

Henrietta Hall, and her husband, Richard Hall, who was then living, had assigned to the testator of petitioner the money sought to be recovered in the original suit, to secure the payment of a sum of money due him from the said Hall and wife.

At the time this assignment was made, the original cause, being that of the said *Hall and wife vs. William D. Clagett and others*, was depending in the Court of Appeals upon appeal from the decree of this court, the object of which suit was to recover from the defendants certain sums claimed by the female complainant under the will of her father, Joseph W. Clagett. The paper containing the assignment is addressed to the clerk of the Court of Appeals, and directs him to enter the cause for the use of the petitioner's testator, William Stewart, the object being as expressed upon the face of the assignment, to secure to him the sum of \$170 62, due by the assignors to him for house rent and fire wood, and was made especially in consideration of the said Stewart's agreeing to forbear selling certain property liable to distress; the assignment to be void in case the debt should be paid from other sums, and the surplus, if any, to remain to the sole and separate use of the said Henrietta M. Hall. By a copy of the docket entries in the Court of Appeals of December term, 1835, it appears the case was entered in conformity with the directions, and on the 14th of January, 1836, the same cause in this court was also marked for the use of William Stewart.

The cause in the Court of Appeals was heard and decided at December term, 1837, when for the reason assigned it was remanded to the Court of Chancery for the purpose of making a new party, and taking further proof, &c. An amended bill making such new party was filed on the 14th of February, 1838, but in docketing the case the Register omitted the entries which had been made in the original cause, and the use, therefore, to William Stewart did not appear among the docket entries of the case made by the amended bill, though the amended bill was nothing more than a continuation of the original cause.

It was while the case made by the amended bill was depending that the compromise and settlement of the 27th of Febru-

ary, 1842, was made, and the money then ascertained to be due Hall and wife being now paid and brought into court, the question as to its proper application is presented and has been argued upon the petition of the executor of William Stewart, already referred to, and the answer to said petition by Richard B. Darnall, filed on the 13th of March, 1847.

By a paper filed in the cause on the 5th of July, 1845, the genuineness of which, as of all other papers and documents on both sides, is admitted, it appears that Mrs. Hall, her husband being then dead, on the 12th of the preceding month of June, assigned and transferred to said Darnall all her interest in the said suits, and in the note of William D. Clagett before mentioned, and authorized and empowered him to have said suits entered for his use, and to prosecute the same, and to collect the money due on the note by suit or otherwise. Upon the face of the assignment it was stated to be in consideration of a previous assignment in favor of Darnall, executed by Mrs. Hall about the 19th of August, 1841, but which was lost, and for other valuable considerations; and Darnall in his answer states that many years anterior to 1841 he had advanced large sums of money for the support of Hall and his wife, and their family, under the promise and full belief that they would be repaid to him out of the money they might recover in this suit. That on the 19th of August, 1841, he came to Annapolis and procured from the solicitor of Hall and wife the form of an assignment which was executed by Mrs. Hall, her husband being then dead, to secure him in part for his said advances the sum of one thousand dollars, and that this assignment, which was sent to Annapolis, has been lost or mislaid.

The case, then, as exhibited by the proceedings in the cause, is simply this: Mrs. Henrietta M. Hall and her husband, Richard Hall, are prosecuting a suit in the Court of Chancery for the recovery of a sum of money, or the proceeds and profits of certain property, held by trustees for her use under the will of her father. Whilst that case is depending in the Court of Appeals upon appeal from the decree of the Chancellor, Mrs. Hall and her husband, on the 22d of October, 1835, for a valu-

able and meritorious consideration, assign the same to William Stewart, as expressed in the assignment, and the clerk of the Court of Appeals, according to the directions of the assignors, entered the case for his use. Afterwards, on the 14th of January, 1836, the same cause was marked for Stewart's use in the Chancery Court. This was the state of the case when the Court of Appeals, at December term, 1837, remanded the cause to the Court of Chancery for the purpose of amendment by making a new party and taking further proof, and because the use to Stewart was not marked on the docket, when and since the amended bill was filed in 1838, it is alleged that Stewart has been guilty of such laches and neglect as will induce a Court of Chancery to deprive him of his security.

I cannot bring myself to think so. He had done everything which could be required of the most cautious and prudent man. He had caused the interest he had in the suit to be exhibited in both courts, and if from the great number of docket entries it was not convenient to enter the use to him when the amended bill was filed, this surely should not impair his right. It was the act of the clerk and not his act.

Certainly a party who has obtained the assignment of a suit or decree has done everything which can reasonably be required of him when he has caused the entry to his use to be made. To insist that he must not only do this, but that he shall likewise see whenever the cause is transferred from docket to docket, that the entry to his use is duly copied, would, in my judgment, be imposing a very great hardship upon him. It is a requisition which I could not be induced to insist upon unless impelled by considerations much more stringent than exist in this case. Mr. Darnall, the rival claimant, did not take an assignment of this claim in 1841 or 1845 for moneys advanced and paid at the time, but to secure a pre-existing debt, as clearly appears by his answer to the petition of General Stewart. He states, to be sure, that during the period he was making such advances for the support of Hall, his wife and his family, "he did so under the promise and with the full belief that the same would be paid to him out of the sums of money which they might recover

in their said suit," and that in 1841, when the first assignment to him was made, it was to secure to him in part of the claim due him for advances, one thousand dollars. But he does not say there was any promise to assign the suit to him at any time prior to the year 1841, when the first assignment was executed, when his claim for advances exceeded the amount subsequently recovered from the defendant, Clagett. The suit had, in fact, been depending since the year 1832, and no reason can be given why Darnall did not take an assignment, if his claim was to be secured in that way. A promise to pay a creditor out of the fruits of a depending action, and a promise to assign the action to him are very different things. In the one case credit is given to the party making the promise, that is, that he will make a proper application of the money when recovered; in the other a specific security is looked to, the creditor proposing to take it in his own hands, and not to trust his debtor with the receipt and disposition of the money. Darnall then does not stand in the attitude of a *bona fide* purchaser without notice, paying his money at the time the transfer was made to him. His position is that of a creditor taking the assignment of a claim to secure a pre-existing debt due for advances not made upon any promise even to make him such assignment. Whatever Mr. and Mrs. Hall may have promised him whilst he was making the advances, and whatever his belief may have been, there was no engagement on their part to assign him the claim, and considering the large amount claimed in the suit against Clagett and others, it is by no means certain that he would have been unwilling to advance means for the support of Hall and wife because of the small amount they had assigned to Mr. Stewart.

Mr. Stewart then being the first assignee to secure a claim fairly and justly due him, is clearly entitled to be paid first. unless as is contended by the solicitor of Mr. Darnall, there are circumstances in the case sufficiently strong to raise a presumption that he has been paid, and I can see nothing in the case to warrant such presumption. Indeed, if the letter from Mrs. Hall to the late Register of this court, dated the 26th of January, 1836, can be used for any purpose, it is in opposition

to such presumption, as it expressly prohibits the payment of any order except that which she had given for the payment of her fee due her solicitors.

There is, in my opinion, nothing in the objection raised by the answer, that under the will of Joseph W. Clagett, Mrs. Hall had no capacity, during the life of her husband, to make the assignment to Mr. Stewart. That assignment was made to secure a claim due for house rent and firewood furnished for the shelter and accommodation of himself and family, and it is not readily to be supposed that the testator, who was the father of Mrs. Hall, designed to deny to her the right to use the trust property for the payment of claims of that character.

The object of the testator was evidently to prevent the trustees from paying any portion of the proceeds of the trust estate to Mr. Hall, but the receipt of Mrs. Hall were in express terms made sufficient discharges to the trustees, and I understand the will to mean receipts given by her during coverture. for as the trust was to determine with the death of Mr. Hall. there could be no necessity or propriety for saying her receipts after his death should be valid acquittances, as the trust upon that event ceased and the property vested in her, disencumbered of it. She was, therefore, entitled during the lifetime of her husband to receive the proceeds of the trust estate, and being entitled to receive, had the correlative power to dispose of such proceeds, at least for the support of herself and her children, and this, as I conceive, she might do even without the concurrence of her husband, who united with her in the assignment to Mr. Stewart.

In addition to the claim of \$170 62, to secure which the assignment was made, the petitioner insists that he is entitled to be paid certain costs said to have been incurred by him in the progress of the cause. But in my opinion there is no foundation for the claim to be paid such costs out of this fund.

The assignment was made specifically to secure the payment of the sum of \$170 62, with interest from the 22d October, 1835, out of the money to be received in the pending suit, and the surplus, if any, was reserved for the sole and separate use of Mrs.

Hall. This surplus she has disposed of by her assignment to Mr. Darnall, and such surplus, therefore, must be paid to him.

GEORGE H. STEWART, for Petitioner.
A. RANDALL, for Darnall.

RICHARD GOODWIN AND OTHERS	}	IN THE LAND OFFICE, JUNE, 1848.
vs.		
WILLIAM CATON.		

[RECITAL IN ESCHAT WARRANT.]

THE recitals in an escheat warrant of the death of a party without heirs, are not *prima facie* evidence that the land is liable to escheat so as to throw the burden of proving the contrary upon the party who resists the patent. Where a certificate has been regularly returned on an escheat warrant, and has remained long enough in the land office to justify the issuing of a grant, a reasonable *prima facie* presumption arises that the land is escheatable. An escheat grant is *prima facie* evidence that the land granted is liable to escheat.

[William Caton obtained a special warrant of escheat from the land office, on the 22d of May, 1844, to resurvey and affect a tract of land in Anne Arundel county, called "Eleanor Meek's Land," "for want of heirs of a certain John Warmesley and John Goodwin, who died seized thereof, intestate and without heirs, as it is apprehended," to correct and amend the errors in the original survey, and to add contiguous vacancies, &c. The certificate of survey was executed in September, 1844, and returned the 10th of July, 1845, and on the same day was caveated by Richard Goodwin and others. Testimony was then ordered to be taken, the purport of which sufficiently appears from the following opinion of the Chancellor, as Judge of the Land Office, delivered on the 26th of June, 1848.]

THE CHANCELLOR :

It must be assumed in this case, that the title of John Warmsey was transferred to Richard Goodwin, it appearing from an examination of the debt books that the quit rents were paid by the latter from the year 1755 to 1775, and the evidence showing that Goodwin, and those claiming under him, held possession of the property for upwards of fifty years.

It is said by the counsel for the caveatee that the recital in the escheat warrant of the death, without heirs, of John Warmsey and John Goodwin, is *prima facie* evidence in favor of the state's title, and the case of *Lee vs. Hoyer*, 1 Gill, 200, is referred to in support of the position. The case cited, by no means establishes the position, though it does prove that where a certificate has been regularly returned upon an escheat warrant, which has remained long enough in the land office without *caveat* to justify the emanation of a grant, a reasonable *prima facie* presumption arises that the land is escheatable. In this case the certificate was returned on the 10th of July, 1845, and was *caveated* the same day. To allow the mere recital in the warrant to raise the presumption contended for, would be to permit parties interested to fabricate evidence for themselves in opposition to the general rule which forbids it. The Court of Appeals evidently put the matter upon a different ground, making the presumption rest upon the acquiescence of the public, that acquiescence being shown by the omission to object to the patent for the required period after the certificate has been returned to the office.

In the case of *Casey's Lessee vs. Inloes et al*, 1 Gill, 434 and 510, the Court of Appeals say an escheat grant is *prima facie* evidence that the land granted is liable to escheat, but I am satisfied, that no case can be found in which it has been decided, or even intimated, that the mere recital in the warrant, which is the act of the party himself unsupported by any concurring circumstances, has been considered as raising any presumption that the land is liable to escheat, so as to throw the burden of proving the contrary upon the party who resists the patent.

There is in this case, then, no *prima facie* evidence in favor

of the party who took out this warrant, but even if there was, I am satisfied from the evidence that the title was at one time in Richard Goodwin, and that he has heirs now living upon whom it descended, and, consequently, that the land is not liable to escheat. I am also of opinion from the evidence, that there is no vacancy, the whole having been held and used as part and parcel of the original tract, and, therefore, the caveat must be ruled good.

A. RANDALL, for the Caveator.

STOCKETT and ALEXANDER, for Caveatee.

WILLIAM HOLMES
vs.
WALTER MITCHELL ET AL.

} MARCH TERM, 1850.

[INCREASE OF FEMALE SLAVES.]

A TESTATOR devised a farm "with all the rest of his negroes, stock of every description and plantation utensils, in trust," that "the *income* arising therefrom" be applied to the benefit of his uncle and aunt during their lives, and then over. HELD—That the increase of the female slaves born during the life of the uncle and aunt, did not belong to the legatees for life but pass to those entitled in remainder.

[In this case but one question was raised, and that is fully stated in the opinion of the Chancellor.]

THE CHANCELLOR :

The decision of the question raised by the pleadings in this case depends upon the construction which should be given to the will of Ignatius Semmes, deceased, or rather, to the following clause of that will, for, as it seems to me, the other parts of the will throw no light upon the subject. The clause in question is as follows: "I give and devise to Walter Mitchell, Esq., my farm called Rose Hill, together with all the rest of my negroes, stock of every description, and plantation utensils,

in trust to and for the following uses and purposes, that is to say, the income arising therefrom to be applied to the mutual benefit of my uncle William Holmes, during the life of my said uncle, and my aunt Sarah Floyd, and after the death of my said uncle, to the mutual benefit of my aunt Sarah Floyd and her children, and after the death of my aunt Sarah Floyd, to the use and benefit of the children of my said aunt Sarah Floyd, until the youngest shall arrive at the age of twenty-one years, and then I will and devise the said farm, called Rose Hill, together with the rest of the property so as aforesaid, left in trust to the children of my aunt Sarah Floyd, to them and their heirs forever."

This bill is filed by William Holmes, the uncle of the testator, to whom, together with his aunt Sarah Floyd, the income of the trust estate was given for life, and the question is, whether the issue of the female slaves comprehended in the bequest, born since the death of the testator, must be regarded as a part of the "income," and to be so applied by the trustee for the benefit of the *cestui que trusts* for life. The bill in this case claims that the trustee should be compelled by decree to transfer to the complainant the said slaves so born since the death of the testator, or such of them as the complainant is properly entitled to, and one-half of such as may be hereafter born, and that the support of the infants may be equally charged upon the income of the complainant and the said Sarah Floyd.

There can be no doubt after the numerous decisions of the highest court of this state, that the bequest for life, or for a term of years, of a female slave, or of the use of a female slave, entitles the legatee to the issue born during the existence of the life estate, or during the term, upon the principle established during the colonial government, that the issue is to be considered as a part of the use and not as an accessory to follow the right of the principal. *Scott vs. Dobson*, 1 H. & McH., 160; *Somerville vs. Johnson*, *ib.*, 352; *Hamilton vs. Cragg*, 6 H. & J., 18; *Sutton vs. Crain*, 10 G. & J., 458. Many other cases could be cited to the same effect, but these are sufficient to show that the principle is too firmly settled to be shaken by any thing short of legislative authority.

No case has, however, been decided precisely like the present, and perhaps it may be said that the principle which has governed the courts in the cases in which the question has arisen does not apply to it. That principle, as shown in the opinion given by Daniel Dulaney, Esq., to the Governor acting as Chancellor, rests upon three reasons. "That the issue ought to go to the person to whom the use is limited, otherwise having no interest worth regarding, he might not take care of the issue." "That it would only be a reasonable satisfaction for the expense of maintenance and for time lost by the parent," and that "when the use is given, a bounty at all events is intended, but instead of a benefit, if the issue should go over, there might be a loss." These are the reasons upon which the right of the legatee has been placed, and perhaps they would not be considered applicable to a case in which the legatee is not charged with or bound to provide for the support of the issue in infancy or to take care of the parent during her pregnancy, though his income from the trust estate might be diminished by the application of a portion of it by the trustee to those objects. In this case, and under this will, it is the duty of the trustee out of the income of the trust estate to maintain and support the issue of the female slaves during their infancy, and, therefore, there can be no actual loss to the legatee for life if the issue goes over to those who are entitled in remainder, he being under no personal obligation to support such issue, nor, for the same reason, is there any danger that the issue will suffer, because none may feel a sufficient interest to take care of them, it being, as I think, the duty of the trustee so to do, out of the profits of the trust estate.

In this will, a mass of property, consisting of real and personal estate, is devised and bequeathed to a trustee, the income arising therefrom, to be applied for the benefit of two persons for life. The right to the possession of the property did not pass by the will, nor are any of the corresponding obligations thrown upon the legatees, which such rights of possession would impose upon them, and upon the existence of which obligations their title to the issue has been placed. They are to enjoy the income of

the trust estate and nothing more, and the question is, whether the issue of the female slaves, upon the true construction of this will, passes as a part of the income? I entertain a very strong opinion that the construction contended for by the complainant in this case would not be in accordance with the intention of the testator, and it seems to me equally clear, that it is in conflict with the principles of humanity, which, unless found in opposition to some settled rule or established legal policy, are certainly deserving of consideration.

To separate the issue from the mother, and either transfer it, as the bill prays, to the complainant, or sell it that the purchase money may be divided between the complainant and Sarah Floyd, of course involves the necessity of determining at what age this may be done. The infant cannot be torn from its mother and sold or transferred to the complainant. No one would buy, and humanity would cry out against it. There would have then to be a periodical partition, or sale, after first determining at what age the offspring could with propriety or without shocking the public sensibility, be separated from the mother. Does any one believe that the testator intended this, when he said that the "income" arising from the trust property should be applied to the mutual benefit of his uncle (the complainant) and his aunt, Sarah Floyd? I cannot think so, nor do I think that the reasons which have influenced the courts to give to the legatee for life or for a term, the after-born issue, apply to a case where a mass of property is left in trust as here.

It is clear that if the terms of the bequest in this will simply gave the right to the service and labor of the slaves, the title to the issue did not vest in the first takers, but will pass with their parents to these who are entitled in remainder upon the termination of the life estates. Such was declared to be the law by the Court of Appeals in the case of *Sutton vs. Crain*, before referred to. In that case it was said, that the word "use" was so qualified by its connection with the word "hire," as to give the legatee for life nothing more than a right to the service and labor of the slaves. It was remarked by the judge, who delivered the opinion of the court in that case, that but for

the association by the testator of the word "hire" with the word "use" the issue of the slaves bequeathed to the grand-children might have been sold as profits from the use, for the maintenance and education of his grand-children, which clearly was not his design, the hire or use being only appropriated to these objects. Now suppose, instead of the word "hire" being used in connection with the word "use," the testator had employed the word "income," as in this case, and had directed the "income or use" to be applied to maintain and educate his grand-children, would not the consequence have been the same? I am clearly of opinion it would, and that if the words hire or use merely give to the legatee the right to the service and labor of the slaves, the words "income or use" employed in connection can do no more, and that the word "income," standing alone, cannot give a greater right than it would give if associated with the word "use." The object we are endeavoring to arrive at is the intention of the testator, because, that, unless opposed to some inflexible rule or stern legal policy which will admit of no compromise, must regulate the decision of the cause. The word "hire," we have seen, though coupled with the word "use," will not give title to the increase of the female slaves whose hire or use is bequeathed upon the ground that so to construe the bequest would be repugnant to the design of the testator, who, when expressing his meaning in such language, must be presumed to intend to give no more than the service and labor of the slaves. But if such is the consequence of the word "hire," I am at a loss to conceive how the word "income" can have the effect contended for, since the income derivable from slaves is derived, either from their hire or service and labor when employed by the owner.

My opinion is, that when the testator directed the "income" of the estate, left in trust, to be applied to the mutual benefit of his uncle and aunt, he meant the annual income and no more. Certainly, I presume, he so intended with reference to the real estate, and it strikes me, that it would be doing great violence to his meaning, to suppose he intended that these objects of his bounty should receive more than the profits proceeding from

the hire or work and labor of the slaves, and I shall decree accordingly.

McLEAN, for Complainant.

ROBERT J. BRENT, for Defendants.

[The decision in this case was affirmed upon appeal by a divided court. See 4 *Md. Rep.*, 532.]

J. D. JONES,
vs.
ELIJAH BADLEY
AND
JOHN T. DARBY,

}

CAVEATS IN THE LAND OFFICE,
SEPTEMBER, 1850.

[LAND OFFICE—ESCHEAT PATENTS.]

AN escheat grant will pass all the land comprehended within the true location of the tract escheated ; it relates back, by operation of law, to the original grant, and is within the rule of law, of relation between grants and certificates.

But this doctrine of relation is founded upon a principle of equity, and where an escheator *expressly* excepts from his survey a part of the tract escheated and does not pay for it, the doctrine does not apply.

As a general rule, lands which have escheated cannot be taken up under a common warrant as vacant lands.

But where no fraud or imposition has been practiced upon the State, and there were no improvements upon the land which the party had taken up under a common warrant, honestly supposing it was vacant, paid the purchase money therefor and erected improvements thereon, the grant will not be refused though the land be escheat.

The Chancellor, sitting as judge of the land office, may decree according to equity and good conscience, and agreeably to the principles established in the High Court of Chancery, as if the matter were brought before him by a bill in chancery.

It is a general rule of the land office to issue the patent when the right is doubtful, in order that the party may not be deprived of the privilege of taking the judgment of a court of law upon its efficacy.

[The following opinion of the Chancellor was delivered by him as Judge of the Land Office upon caveats filed to two certificates therein referred to. The facts of the case are fully stated in the opinion.]

THE CHANCELLOR:

These cases have been submitted and argued together, and with one exception depend upon the same facts.

The land originally constituted part of a tract, called "Gladstone's Choice," granted to Peter Ellis in the year 1687. By him it was conveyed to Richard Ashton, who died seized thereof, intestate and without heirs, so that it became escheat, and was granted as such to Joseph Collins in 1763 as "Bachelor's Folly."

In the resurvey upon the escheat warrant, eighteen acres and one-half acre were excluded because covered by the waters of Nanticoke river, and in this state of things in the years 1831 and 1835, the land so escheated was taken up under common warrants, the first by Elijah Badley, whose certificate contains one acre, and the other by John T. Darby, whose certificate contains eleven and three-fourths acres.

These certificates have been returned, the composition paid, and caveats being filed by a party interested in the escheat grant, the question is whether, according to the rules and practice of the land office and the equities of the matter, patents should be issued upon these certificates?

It is insisted upon the part of the caveator, and the principle is not to be and has not been disputed, that the escheat grant will pass all the land comprehended within the true location of the tract of land escheated. The earlier cases upon this subject have been recently sanctioned by the Court of Appeals in the case of *Casey's lessee vs. Inloes*, 1 *Gill*, 507, and there can, therefore, be no doubt that an escheat grant does, by operation of law, relate back to the original grant, and is within the rule of law of relation between grants and certificates. But this doctrine of relation is founded upon a principle of equity, and, therefore, when it clearly appears that the escheat grant was not intended to include all the land comprehended within the lines of the original tract, and that the party taking out the escheat warrant knew he was not including in his survey under it, all the land which had escheated, and did not pay for it all the foundation upon which the doctrine rests is removed, and it cannot consequently apply.

In the present case, therefore, as it appears to me, the principle of relation is inapplicable, because the resurvey under the escheat warrant, *in express terms*, excludes the land in question. The escheator, therefore, knew he was not getting it, and did not pay for it, and there can be no principle of equity which will give it to him.

But it is said that conceding the land did not pass to the grantee under the escheat patent, still it was not liable to be taken up under common warrants, and therefore the caveats must be ruled good.

The principle that lands which have escheated to the state cannot properly be taken up as vacant, seems to be quite clear, but so long as the State alone is interested, I do not very well see why she may not herself agree to waive the right which the reversion of the land to her by the failure of heirs on the part of the owner may have conferred upon her. If, to be sure, any fraud or imposition has been practiced upon the State, as in the case of *Lord Proprietary vs. Jennings et al*, 1 H. & McH., 92, the party perpetrating the fraud or those claiming under him could not be permitted to reap the fruits of it, but if the transaction was fair and the result of mistake all round, it would not be difficult to conceive of cases in which the principles of justice would be violated in taking from a party, lands acquired under a common warrant which had escheated. One of the cases now before the court may be taken as an illustration. Upon the land covered by the certificate of "*Badley's Beginning*," it is admitted that at the time of the survey thereof, and the return of the certificate, there were no improvements of any description, and that it is situated on the flats of Nanticoke river, between high and low water marks on said river. It had become escheat in 1762, and was expressly thrown out of the resurvey under the escheat warrant in 1763. That it was honestly supposed to be vacant land by Elijah Badley, when he made his survey in 1831, there is not the least reason to doubt, and, indeed, as there were no improvements upon it, and consequently none to pay for, there was no motive for not taking out

an escheat warrant if he had known it had escheated. The expense of acquiring the title would have been no more.

Since taking it up he has paid for it and erected improvements at some considerable costs. Under these circumstances, the question is whether, in the language of the late Chancellor, it would be "according to right, to reason, and to good conscience," to deny him a grant. The Chancellor, sitting as Judge of the Land Office, as remarked in the case from which the above expressions are taken, "may decree according to equity and good conscience, and agreeably to the principles established in the High Court of Chancery, as if the matter were brought before him by a bill in chancery." *Cunningham vs. Browning*, 1 *Bland*, 319, 320. Now, upon a bill in equity, it could not, it seems to me, be successfully contended that the State, after selling her lands, as has been done in this case, receiving the purchase money, and after the innocent purchaser had erected improvements upon the property purchased, could reclaim them upon the ground that the mode in which the title was proposed to be acquired was not the appropriate one. In this case, the State has neither been defrauded nor prejudiced, and if she withholds the grant, will be inflicting a serious injury upon the purchaser, because, in that event, it would be depriving him of the privilege of testing the validity of his title in a court of law. For notwithstanding the patent may issue, its effect in passing the title may be questioned in a suit at law, and hence the general rule of the land office to issue the patent when the right is doubtful in order that the party may not be deprived of the privilege of taking the judgment of court of law upon its efficacy.

For these reasons I deem it right to overrule the *caveat* to the certificate for "*Badley's Beginning*," but shall rule it good with reference to the certificate for "*Spottsville*," in regard to which no agreement has been made, and consequently as to it the same equitable considerations do not exist.

JONES, for Caveator.

DONE, for Caveatees.

VIRGIL B. DALRYMPLE
 vs.
 ERICKSON H. TANEYHILL
 AND WIFE.

MARCH TERM, 1853.

[MUTATION OF REAL TO PERSONAL ESTATE.]

REAL estate, in which an infant was interested, was sold under a decree of this court, which sale was finally ratified and confirmed by an order of court. But the purchaser afterwards failed to comply with the terms of sale, and the trustee applied for a resale under the act of 1841, ch. 216, and an order passed accordingly, after which and before the second sale, the infant died.

HELD —

That the mutation from realty to personalty was not complete at the death of the infant, the purchaser not having complied with the terms of sale, and her share of the proceeds of sale passed as real estate to her heir at law.

The mutation is complete when the sale is ratified, and the purchaser has complied with the terms of it by paying the money, if the sale is for cash, or by giving bonds, if the sale is on credit, and a concurrence of all these circumstances is necessary to effect the change.

[The facts of this case are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR :

The facts upon which the questions presented by the exceptions to the Auditor's report in this case arise, are few and simple, and may be briefly stated.

On the 23d of October, 1850, Virgil B. Dalrymple, in his own right, and Agnes E. Dalrymple, his daughter, then an infant, by the said Virgil, as her guardian and next friend, exhibited their bill in this court, praying for the sale of the real estate of Zachariah Taneyhill, lately deceased, intestate, upon the allegation that the same was incapable of partition, and that it would be for the interest and advantage of all parties concerned that it should be sold and the proceeds divided among the heirs at law. Dalrymple, the father of Agnes, had intermarried with one of the daughters and heirs at law of Zachariah Taneyhill, and she having afterwards died, he became tenant by the curtesy of her share of said estate, his daughter

Agnes as her sole heir at law being entitled to the remainder in fee.

It was subsequently ascertained that the estate was capable of partition, and a final decree of partition was made on the 1st of March, 1852, ratifying and confirming the return of the commissioners and assigning to the complainants, Dalrymple and his daughter, the former for life, and the latter in fee, that portion of said estate which was described in said return as Lot No. 1.

In the decree, power was reserved to the complainants to apply to the court for a decree for the sale of this lot, and for this purpose a commission was directed to be issued to such person as they might select to take proof to establish the allegations of the bill.

The necessary proof being obtained, the court, on the 16th of March, 1852, passed a decree in the usual form, for the sale of said parcel of land, and appointing a trustee for the purpose.

A sale was accordingly made to one Theodore Hodgkin, on the 11th of May, 1852, for the sum of \$2140, a report thereof made, and a final order of ratification passed on the 19th of July following.

Hodgkin, the purchaser, having utterly failed to comply with the terms of sale, the trustee on the 2d of August, of the same year, in pursuance of the provisions of the act of 1841, ch. 216, filed his petition, praying that he might be compelled to comply, or in default thereof, that the property might be resold at his risk and expense.

Hodgkin, upon notice, having failed to comply, or show cause to the contrary, the court, on the 8th of September, 1852, passed an order for the resale of the property at his risk.

Agnes E. Dalrymple, the infant, died on the 4th of October following, intestate, and without issue, leaving her aunt, Mary E. D. Taneyhill her only heir at law, and on the 12th of the same month and year, the trustee, with the consent of Hodgkin, the first purchaser, sold the property at private sale to Erickson H. Taneyhill, the husband of Mary E. D., the aunt and heir at law of Agnes E. Dalrymple, the infant.

This sale has been duly ratified, and the controversy as to a portion of the proceeds of the sale is between Virgil B. Dalrymple, the father and personal representative of Agnes, and Taneyhill and wife, in right of the wife, who is her aunt and heir at law.

Arguments have been addressed to the court to prove that the land in question, whatever may have been the form of the proceeding, must be regarded as having been sold under the act of 1816, ch. 154, and that if so, it is quite immaterial in what character the proceeds may be viewed, whether they are still to be considered as real, or to have been absolutely converted into personal estate, their destination is the same, and they still shall go to those who would be entitled to the land as if no sale had been made, and this undoubtedly is the effect of the 9th section of the act referred to.

I am not, however, quite prepared to say that the sale in this case was made under the provisions of the act in question. The bill was unquestionably framed with a view to the 12th section of the act of 1785, ch. 72, and, indeed, when it was filed, the circumstances of the case were not such as to justify a proceeding under the act of 1816, which contemplates a proceeding where infants alone are concerned, nor was the machinery prescribed by the latter act taken in connection with the 2d section of the act of 1818, ch. 133, resorted to.

But be this as it may, there can, I think, be no impropriety, on the contrary, there is an evident fitness, in looking to the provision of the act of 1816, and other laws displaying the same policy, when we are seeking to adjust the conflicting equities of the personal representative and heir at law of one who has purchased or acquired by descent real estate. And, in a doubtful case, this policy, so conspicuously manifested by the legislature and pervading the law of descents at all times, would not be without its influence upon the mind of the court.

Looking, however, to the circumstances of this case, it does not appear to me to be necessary to seek for aid from considerations founded upon legislative policy, or to be derived from the rules prescribing the path of descent of real estate.

In my opinion, there had not, in contemplation of law, been a conversion of the real estate of this infant, into personal estate at the period of her death, on the 4th of October, 1852, and therefore the proceeds derived from the subsequent sale on the 12th of the same month, must go to her who occupied the relation of heir at law to the exclusion of the personal representative.

I had occasion to consider this subject very carefully in the case of *Betts et al* vs. *Wirt et al*, decided on the 24th of October, 1851, and reported in 3 *Md. Ch. Decisions*, 113, and came then to the conclusion that the mutation from real into personal estate was *not complete* until every thing had been done to effect the mutation which the Court of Appeals, in the cases referred to, said was necessary for that purpose. The cases referred to were those of *The State* vs. *Krebs*, 6 *H. & J.*, 31; *Leadenhan* vs. *Nicholson*, 1 *H. & G.*, 267, and *Hammond* vs. *Steir*, 2 *G. & J.*, 81, in which, upon great deliberation, it was held, that "the mutation of real into personal estate was complete when the sale was ratified by the court and the purchaser has complied with the terms of it by paying the money, if the sale is for cash, or by giving bonds, if the sale is on credit." And no case can be found in which it has been held or intimated that the concurrence of all these circumstances is not necessary to effect the change.

Certainly it would be very strange in the court of last resort to undertake to lay down, with precision, and, as they say, great deliberation, the rule which should govern in these cases, if they have committed the inaccuracy imputed to them in requiring a condition not at all essential to the purpose in view.

The argument pressed now is, that one of the circumstances, and that a very important one, which the Court of Appeals say is necessary to work the mutation from real to personal estate may be dispensed with; that the sale, and the confirmation of the sale by the court, are sufficient for the purpose, though the purchaser may have neglected to comply with the terms, either by paying the money or giving the bonds, though the appellate court have said, when the question was, what combination of

circumstances shall change the nature of real and impress upon it the character of personal estate, that a compliance by the purchaser with the terms is necessary. If the purchaser does not comply with the terms of sale, the thing, which is the equivalent for the real estate sold, does not exist, and may never exist. The land would be gone, or its nature changed, and neither money, or security for the money to be paid for it brought into existence.

In this case, Hodgkin, the first purchaser, bid, and the property was struck off to him for \$2140. If the land was changed from real to personal estate by the ratification of this sale, into what was it changed? Why surely into the purchase money. But the purchase money has been neither paid or secured to be paid, and, therefore, it would follow, if the argument pressed be sound, that the real estate would be gone, and the only equivalent for it would be the bid of an insolvent man, who, according to the petition of the trustee, asking for authority to resell the property, had not only refused to comply with the conditions of the sale, but was trifling with the court and baffling its authority. Surely it would be very unwise to adopt a principle from which such consequences must necessarily follow. If real estate is converted into personalty, and especially the real estate of minors, it should be into something tangible and substantial, and the mere bid of an irresponsible man, though that bid may have been accepted by the court, cannot be permitted to have such an effect. The act of 1841, ch. 216, under which the proceeding for a resale was had, gives no countenance to the idea that a non-complying purchaser is regarded as the owner of the estate sold by a trustee. It authorizes a resale of the property at his risk, but not as his property, on the contrary, the order which the court is authorized to pass by this act, and the order which was in fact passed in this case is a revocation of the order confirming the sale and destroys any inchoate title which the first purchaser may have acquired by the confirmation.

The case of *Hunter vs. Hatton and Kendrick*, 4 Gill, 116, has been referred to as an authority to prove that the title of the

purchaser, at sales of this description, vests when the order of ratification is passed, and that the trustee's deed is not necessary. But, in my opinion, the case supports no such proposition. It decides simply that the deed of the trustee does not operate merely from the time of its execution, but being a conveyance under a judicial sale upon the principles of relation, it operates retrospectively, and vests the property in the grantee from the date of the sale. But if the sale and the ratification of that sale by the court, *per se*, passed the freehold, where the necessity of resorting to the doctrine of election. That doctrine rests upon a principle of equity, and is intended to protect the title of a party who has complied with his contract in the intermediate period between the inception and consummation of his title.

My opinion, therefore, is, that there was not in contemplation of law, at the period of the death of the minor, Agnes E. Dalrymple, a mutation of her real into personal estate, and I shall pass an order confirming the Auditor's account, which gives the proceeds of the last sale to her heir at law.

STOCKETT, for the Personal Representative.

RANDALL and HAGNER, for the Heir at Law.

HENRY ROBINSON AND OTHERS,	}	SEPTEMBER TERM, 1852.
vs.		
WASHINGTON DECATUR ROBINSON AND OTHERS.		

[INADEQUACY OF PRICE—CONSTRUCTION OF WILL.]

A TESTATOR by his will manumitted his negroes, and devised certain real estate to a trustee "in trust to be rented out by him, and the rents and profits to be received by him and annually paid to" said negroes, "or their order, attested by some justice of the peace," and directed the trustee, upon the death of any of these legatees to pay over "whatever property he shall then have, as trustee to the legal representatives and heirs at law of the deceased, unless the deceased shall make some other appointment by his last will and testament duly executed." He then gave the trustee the power to sell the lands,

with the desire of the *cestui que trusts* of full age, and invest the proceeds in some safe securities for their benefit, but this power he revoked by a codicil, and expressed a desire that no part of the trust estate should be sold. **HELD**—That by this will the negroes had no power in their lifetime to make an absolute disposition of this property.

In the judicial interpretation of wills, the intention of the testator, to be gathered from the entire instrument, must prevail unless it violates some established principle of law.

If the grantor be *compos mentis*, and there be no fraud or imposition practiced upon him by the grantee, the transfer must stand though the thing sold be worth four times as much as by the contract was agreed to be paid for it.

Where property is sold for \$750, which is worth \$2800, the inadequacy is so great as to shock the conscience, and to amount in itself to conclusive and decisive evidence of fraud, and would of itself be a sufficient ground for refusing a specific performance of the contract if it remained unperformed.

[The bill in this case was filed in May, 1850, by Henry Robinson, a free negro, and others, free negroes, against Washington D. Robinson and others, free negroes, and John D. Farquharson, for the sale of certain real estate devised to William Rea, in trust for them, by William S. Harper, of Dorchester county. The bill alleges among other things that William Rea had declined the trust, and that John D. Farquharson had been appointed by the Court of Chancery trustee in his stead; that the land was deteriorating in value, and that it would be for the advantage of all parties interested to sell the same, and that the proceeds be divided among the parties interested, according to their several respective proportions, and invested for their use and benefit. This bill also states that negroes Daniel and John, mentioned in said will, have, since the death of the testator, died intestate, leaving complainants and defendants their heirs at law. The will of William S. Harper, filed as an exhibit with this bill, is dated the 17th of February, 1838, by which, after payment of debts and funeral expenses, he disposes of his property as follows :

By the third clause he bequeaths a horse to his negro boy Henry. By the fourth he directs all his personal estate not otherwise disposed of to be sold by his executor on one year's credit, with security, bearing interest from date till paid, and the money, when received from said sale, and whatever money

may be due him at the time of his death, to be equally divided, share and share alike, between the negroes manumitted by the succeeding clause of his will, and the same paid over to them severally, at such times and in such sums as the trustee named in the will shall deem proper.

"Fifth. It is my will and desire that my eight negroes, to wit : Old John, Kate, Daniel, Mary, Hannah, Henry, Ann, and Nancy, shall be free immediately after my death."

"Sixth. I give and devise to my friend William Rea, of Cambridge, his heirs and assigns forever, my plantation whereon I now live, and all the lands thereto belonging, (except one acre where my dear wife is buried, which I wish always kept sacred as a burial ground,) upon trust that the said plantation shall be rented out by him, and the rents and profits received by him and paid over to my negro boy Daniel, or his written order, attested by some justice of the peace. I also devise to William Rea, his heirs and assigns, all the land that I purchased of Francis H. Waters and George Robertson and wife, that lie eastward of a line drawn north by west across said land, beginning at the lane between my land and Jacob Wilson's, where my cross fence joins said land ; from thence running that line until it intersects the line between my land and Thomas Smoot's land. I also give to William Rea all my right to that tract of land called "Expectation," surveyed by me and Thomas Smoot, lying at Crotchett's Ferry, all which lands are given and devised to William Rea, in trust, to be by him rented out, and the rents and profits received by him, and paid over annually to my negro boy Daniel, or his order, attested by some justice of the peace."

"Seventh. I give and devise to William Rea, his heirs and assigns, all the residue of the lands I purchased of Francis H. Waters and George Robertson and wife, (which I have not already devised to William Rea in trust for my negro boy Daniel.) Also, all the lands I purchased from Thomas Birely and wife, I devise to William Rea and his heirs, all in trust, to be rented out by him and annually paid to my negro boy Henry, or his order, attested by some justice of the peace."

"Eighth. I give and devise to William Rea, his heirs and assigns forever, all the lands I purchased from James A. Waddell, sheriff, as the property of James Webster, or Powell and Feddeman, and any other real estate not already devised in trust to be rented out by him, and the money received by him, and equally divided between my six negroes, to wit: Old John, Kate, Mary, Hannah, Ann, and Nancy, and their respective proportions paid annually to each one, or his or her order, attested by some justice of the peace."

"Ninth. I will and declare that any and all receipts given by any legatee, or *cestui que trust*, attested by any justice of the peace, shall be good and effectual releases and discharges for the same, or so much thereof as in such receipt or receipts shall be expressed to be received."

"Tenth. It is my will and desire that immediately after the decease of any of the legatees, or *cestui que trusts*, Wm. Rea, trustee as aforesaid, shall pay over whatever property he shall then have as trustee to the legal representatives and heirs at law of the said deceased, unless the deceased shall make some other appointment by his last will and testament executed according to law."

"Eleventh. If any bequest or devise contained in this my last will and testament shall fail to take effect from any cause, in such an event I will and declare that the trustee and executor by this will appointed, shall immediately transfer the equitable and legal title to the same to the state of Delaware, for the benefit of the said state. And it is, in particular, my wish and desire that in no event shall any part of my estate, real or personal, go to or descend to Jacob Wilson, who married Elizabeth Wheatley, daughter of Ezekiel Wheatley, and in no shape shall he be administrator of my estate."

"Twelfth. It is my will and desire that my friend, William Rea, with the desire of the persons interested in the trust property and of full age, shall have authority to sell and convey the lands and tenements devised to him in trust, or any part of them, on such terms as he shall deem advisable, receive the purchase money, and invest the same in some safe securities for the benefit of those indicated and declared by this will, and in the manner declared."

"Thirteenth. It is my will and desire that my friend, William Rea, shall be the executor of this my last will and testament, and that he shall be entitled to have and receive for his trouble and personal expenses ten per cent. on the inventory as executor, and also ten per cent. on the money he shall pay over as trustee to the several persons interested in the trust, in addition to any other expenses he may deem it just and right to incur for the benefit of the property confided to him as executor or trustee."

On the same day he added a codicil, in which he made a bequest of a silver pitcher to each of two friends, and afterwards, on the 27th of October, 1840, he executed a second codicil, by which he ratified and confirmed his will, "save and except such clauses, bequests and devises therein mentioned as are by me hereinafter revoked and made void." He then revoked the fourth clause of his will, and substituted therefor the following :

"I give and devise unto the said L. M. Roberts, in addition to the above during her natural lifetime and no longer, all that farm I purchased of James A. Waddell, the then sheriff of Dorchester county, as the property of William A. Wheatley, and after her death I give and devise the said farm unto my friend, William Rea, and his heirs and assigns forever, in trust for the benefit of my two negro boys, Daniel and Henry, in the same manner as provided for by the general provisions of this my will."

"The eleventh section of my will I revoke, so far as the same shall be found inconsistent with the following clause of this my codicil. If any bequest or devise contained in my last will and testament, or this my codicil, shall fail to take effect from any cause, in such an event I will and desire that the trustee and executor by this will appointed, shall immediately transfer the equitable and legal title to the same, be the same real or personal, (except negroes,) to the states of Delaware, Pennsylvania or New Jersey, for the benefit of said states, or either of them that will guarantee the freedom and emancipation of my slaves by this my will and codicil, to be liberated and freed, as well as my two young negroes, Washington Decatur, aged about fifteen months, and my negro girl Diana, aged about nine

months, whom I hereby manumit and set free at my death, and I desire my executor and trustee to provide for their support out of my funds belonging to my estate until they shall be able to obtain their freedom under this my codicil and the laws of this state, and to have their part of the property devised under the eighth clause of my will. All that clause of my will providing for the sale of my real estate by my executor and trustee I do hereby revoke and annul, as I do not wish the same sold, or any part thereof."

There was also a third codicil executed on the 2d June, 1841, making an additional devise of a house to his boy Daniel, and also one to Henry, and some wearing apparel to his negro women.

Such proceedings were then had under this bill that a decree was passed the 7th of June, 1850, to sell this real estate by Ezekiel R. Hooper, a trustee, appointed for that purpose in the usual form of such decrees. The sales were made by this trustee for \$7280, and reported 20th February, 1851, and finally ratified by the court 5th November, 1851. The other proceedings in the cause are sufficiently stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

The question which arises and has been argued in this case is presented by certain petitions which have been filed since the property was sold under the decree of the 7th of June, 1850. That decree was passed upon the bill filed by certain parties claiming under the will of William S. Harper, deceased, in which it was alleged that the interest of all parties concerned would be promoted by a sale. John D. Farquharson, one of the petitioners, was a party to the bill, he having been substituted in the place of William Rea, the trustee named in the will of the deceased, and by his answer he admitted the allegations of the bill, and consented to the passing of the decree.

After the trustee's report of the sale had been ratified, Jacob Wilson, by his petition filed on the 30th of July, 1851, stated that he was one of the purchasers, and claimed, by virtue of a

deed and an assignment of Henry Robinson, one of the devisees under the will, the proportion of the proceeds of the sale to which he, Robinson, was entitled. The deed bears date the 25th of June, 1850, and purports, for the consideration of \$750, to convey to Wilson all the interest of the grantor in the real estate of Harper, derived under his will. The assignment, which was executed on the 15th of July, 1851, being subsequent to the sale under the decree, purports for value received to transfer to Wilson the right of Robinson to the proceeds of the sale. And the petitioner, Wilson, prays that the proportion of the proceeds of the sale to which he is entitled by virtue of the transfer from Robinson to him, may be credited to him and deducted from his purchase. Robinson was made a party to this petition, and by his answer admitted its allegations, and consented to its prayer.

But afterwards and before an order had passed, Farquharson interposed his petition, in which he alleges that if such sale has been made as is set up in the petition of Wilson, the consideration is grossly inadequate, and the deed was extorted from Robinson by fraudulent practices and representations on the part of Wilson, and that the answer of Robinson to the petition was procured by like fraudulent practices, and he prays that Wilson may be required to answer his petition and the deed set aside, and the proceeds of sale paid to the petitioner, as trustee, to be invested and applied to the use of the parties. The answer of Wilson to this petition denies every allegation affecting the *bona fides* of the transaction, and insists that the sale from Robinson to him was fair, and for the full consideration of \$750, for which he gave his single bill with interest from the date of the deed.

Upon comparing the amount of the purchase money agreed to be given by the petitioner, Wilson, with the proceeds of the sale made by the trustee, after making every reasonable allowance for those circumstances which it is said caused the property to sell for more than its intrinsic value, there certainly does appear a startling disparity, and it would seem impossible to say that the price agreed to be given is not grossly inadequate

to the value of the property, being very little more than one-fourth of the grantor's proportion of the proceeds of the sale. The amount to be paid by Wilson is \$750, whilst the grantor's proportion of the proceeds of the sale will be very little short of \$2800.

If this disparity is not sufficient to shock the conscience, as some of the cases express it, it is difficult to conceive what would. But it is said, and here lies the difficulty and turning point of the case, that Robinson the grantor is and was *compos mentis*, and being so, and having made sale of the property, and having by his answer declared his willingness that Wilson shall enjoy the benefit of it, no one has a right to interfere and forbid it. Certainly this court would not, nor is it presumed any court would, undertake to interfere with a man's right to dispose of his own property upon any terms he pleases. He may not only sell it for an inadequate price, but he may give it away, and if he be of competent understanding, and the rights of creditors are not involved, no court has a right to say one word about it. I have been unable to discover anything in the evidence in this cause to show that the grantor was not *compos mentis*. Neither are the circumstances relied on sufficiently strong to raise a presumption of the fraud or imposition said to have been practiced by the grantee, and, therefore, if the title of the grantor to the property was such as he could absolutely dispose of, the transfer must stand and have its full effect, although the thing sold was worth four times as much as has been contracted to be given for it. Whether Robinson had a right to dispose of this property absolutely, depends upon the will under which he took it. That will, after several provisions and a clause manumitting his slaves, of whom Henry Robinson the grantor was one, contains the following clause: "I give and devise to William Rea, his heirs and assigns, all the residue of the lands I purchased from Francis H. Waters and George Robertson and wife, (which I have not already devised to William Rea in trust for my negro boy Daniel,) and also the lands I purchased from Thomas Birely and wife, I devise to William Rea and his heirs, all in trust, to be rented out by him, and the

rents and profits to be received by him and annually paid to my negro boy Henry, or his order, attested by some justice of the peace."

Then follows a clause saying that any and all receipts given by any legatee, or *cestui que trust*, attested by any justice of the peace, shall be good and effectual releases and discharges for the same, or so much thereof as in such receipt or receipts shall be expressed to be received. The tenth clause is in these words: "It is my will and desire that immediately after the decease of any of the legatees, or *cestui que trusts*, William Rea, trustee aforesaid, shall pay over whatever property he shall then have as trustee to the legal representative and heirs at law of the said deceased, unless the deceased shall make some other appointment by his last will and testament, executed according to law." The twelfth clause contains this provision: "It is my will and desire that my friend, William Rea, with the desire of the persons interested in the trust property and of full age, shall have authority to sell and convey the lands and tenements devised to him in trust, or any part of them, on such terms as he shall deem advisable, receive the purchase money and invest the same in some safe securities for the benefit of those indicated and declared by this will, and in the manner declared."

By a second codicil, the testator devised to the same trustee, and his heirs and assigns, another parcel of land after the determination of the life estate which another devise took "in trust for the benefit of the said negro boys, Daniel and Henry, to be by him rented out, and the rents and profits by him paid over to the said boys, Daniel and Henry, in the same manner as provided for by the general provisions of the will."

By this codicil, the clause of the will providing for a sale of the real estate of the testator by his executor and trustee is revoked, and a desire expressed that no part thereof be sold.

There is also a clause in the will in which the testator expresses an earnest wish that in no event shall any part of his estate, real or personal, go to or descend to Jacob Wilson, who married Elizabeth Wheatley, daughter of Ezekiel Wheatley, and that in no shape should he be administrator of the estate.

But whether the person here referred to, and the Mr. Wilson mentioned in these proceedings, is one and the same person, does not appear, nor am I prepared to say, (assuming them to be the same,) that the question presented by these petitions would be materially affected by it, though I cannot help thinking the circumstance of such declaration being made by the testator should have induced the person indicated to be cautious how he dealt with the property.

The question, however, is, had Henry Robinson such an estate in the real property mentioned in this will as enabled him to part with the absolute title in fee? If he had, the sale to Mr. Wilson must stand, and the prayer of his petition be gratified. If he had not, Mr. Wilson must take the consequences of dealing with a person who had no right to sell.

It is very clear, I think, that the testator did not intend to confer any such power on this devisee. Rea, the trustee, was directed to rent the estate out, and to pay the rents and profits received by him, annually, to the order of Henry, attested by a justice of the peace. So far from authorizing the *cestui que trusts* to sell the estate, the power which by the will was given to the trustee to sell, with the concurrence of the parties interested being of full age, and to invest the proceeds upon similar trusts was revoked by the codicil, and a desire expressed that no part of the real estate should be sold. The tenth clause of the will furnishes pregnant evidence that the testator never contemplated conferring upon any of the *cestui que trusts* the power of sale. It declares that immediately after the decease of any of the legatees, or *cestui que trusts*, Rea, the trustee, shall pay over whatever property he shall then hold in that capacity to the legal representatives and heirs at law of the deceased, unless the deceased shall make some other appointment by his last will and testament, executed according to law.

The testator then manifestly intended that the object of his bounty should receive from the hands of his trustee the rents and profits of the lands during their respective lives, with the power of appointing by will, who should receive whatever should remain in the hands of the trustee at the time of their

death, and in case no such power should be exercised, that then the property should be delivered over by the trustee to the heirs at law, or the legal representatives of the deceased, free altogether from the trust which then was to terminate. It can scarcely be supposed that the testator designed to confide to either of these *cestui que trusts*, the uncontrolled power to dispose, absolutely, of the estate, when, as we have seen, he revoked by his codicil the authority which, by his will, he had given to the trustee to sell with the concurrence and approbation of the parties interested. Why should he take from the trustee and *cestui que trusts* combined, the power to do that which the latter, without the co-operation of the former might do? It surely was a very idle precaution on the part of this testator to declare that the trustee and *cestui que trusts* together should not sell the estate if he had so framed his will as to enable the *cestui que trusts* to do so by themselves. Looking at the whole will, I am persuaded I should be totally disregarding the intention of the testator if I should decide that Henry Robinson had the power to dispose of this property absolutely in his lifetime by deed, and as the intention of the testator, when not repugnant to the rules of law, shall prevail, I do not feel myself at liberty to make such decision. In the case of *Dashiell vs. Dashiell*, 2 H. & G., 127, the Court of Appeals say, "The position is undeniable, that in the judicial interpretation of wills, the intention of the testator, to be gathered from the entire instrument, shall prevail, unless it violates some established principle of law." And the same principle had been repeatedly asserted before and has been since. No principle of law is, as I think, violated by giving effect to the intention of the testator in this case, and by declaring in conformity with that intention, that Henry Robinson had no power to make, in his lifetime, an absolute disposition of this property.

It does not appear to me that the state of the case is at all altered, or the rights of the parties changed by the sale which has been made under the decree in this case. The property was decreed to be sold, because, as alleged by the bill, and established by the proof, it was for the interest and advantage of all parties interested, that it should be sold and the proceeds di-

vided among them according to their several and respective proportions and invested for their use and benefit. The object of the bill, and the decree which authorized a sale, was to promote the interests of the parties, by rendering the property in some new shape more productive, and not to enlarge the power of the *cestui que trusts* over it. The money or bonds derived from the sale were to be brought into court, to be disposed of under its direction, and should be invested, subject, in all respects, to the trusts of the will.

The petitioner, Farquharson, the substituted trustee, was a party to the bill, and I do not think his trust ceased with the sale of the property under the decree. On the contrary, unless some sufficient reason can be shown, he is the person who should make the investment, and hold the fund in trust for all the parties interested. So far, therefore, from being an intermeddler in the cause, he was, in my opinion, perfectly justifiable in interposing and raising the question of the validity of the sale by the *cestui qui trust* to Mr. Wilson.

But apart from the want of power on the part of the vendor to make the sale to Mr. Wilson, there are other circumstances which cannot be overlooked in deciding upon its validity. The vendor can neither read nor write. His mark is affixed to all the papers executed by him, including his answer to the petition of Mr. Wilson, and there is no very satisfactory evidence that they were read or fully explained to, and understood by him. The proof upon this point is, to say the least, doubtful, and when the vast disproportion between the value of the property sold, and the price stipulated to be paid for it is considered, it would seem eminently proper that the transaction should be free from all suspicion, that the party most liable to be imposed upon, was not fully aware of what he was doing. When it is apparent, upon the face of the transaction, that property had been sold at an enormous sacrifice, and it is shown that the party making the sacrifice is totally uneducated and incapable of reading or writing, a reasonable ground for supposing that he may not have understood what he was doing, cannot be without its influence in deciding upon the validity of

the sale. Here is a case where property has been sold at about one-fourth its value. An inadequacy so great as, in the language of *Lord Eldon*, in *Coles vs. Trecothick*, 9 *Vez.*, 246, "to shock the conscience, and to amount, in itself, to conclusive and decisive evidence of fraud," and which would of itself be a sufficient ground for refusing a specific performance of a contract if it remained unperformed. But it is said, this is an executed contract, and the purchaser comes here simply asking for the fruits of his purchase, which the vendor is willing he shall have. The answer to this is, the vendor can neither read nor write, and it does not very clearly appear, whether the papers to which he has put his mark were read to him or fully understood by him, and that in a transaction where the price is so far short of the value of the thing sold as to subject it, without any other circumstance, to the reprobation of the court, every thing which can remove the suspicion of misapprehension or mistake on the part of the person making the sacrifice, should be supplied by him who sets up the contract.

There is, moreover, another thing apparent upon this record which weighs heavily against the purchaser. The deed, by which Henry conveyed the property to Mr. Wilson, bears date the 25th of June, 1850, and in the body of it, there is an acknowledgment of the receipt of the seven hundred and fifty dollars, the consideration money, and yet in point of fact, the money was not paid at the time, nor has it been paid since. It appears from the evidence of Samuel Twilley, that he sold to Henry a house and lot for two hundred and twenty-five dollars, upon the responsibility of Mr. Wilson, and that he has received from him on account the sum of seventy-five dollars, and this is all, so far as this record discloses, that Wilson has paid on account of his purchase of Henry. And his engagement to Twilley to pay the balance of the \$275, is verbal merely, Wilson having, as the witness states, given him no written obligation therefor.

But not only has Mr. Wilson taken from Henry a conveyance of this property, without having then or since paid the purchase money, but there is strong reason to think the security

he gave Henry for it is invalid. Joseph H. Bell, one of the magistrates by whom the acknowledgment of the deed from Henry was taken, says, "Mr. Wilson, at that time, gave to Henry an obligation, to which the latter made no objection." And further, "he thinks the note was not upon stamped paper; cannot say for certainty, but thinks it was written upon a common sheet of paper." And again, upon cross-examination, he says, "the note was drawn there" (that is, at the time of the acknowledgment of the deed) "to the best of my knowledge on unstamped paper, though as to this I do not speak with absolute certainty." And the proof of the other justice is not at all in conflict with this. It may be assumed, then, I think, as more than probable, not only that no part of the purchase money had been paid, except the seventy-five dollars paid to Mr. Turley, but that the obligation given by Mr. Wilson to Henry, is an invalid security for want of a stamp. It is true, the omission to use stamped paper for the obligation in question, may be remedied in the mode pointed out in the 8th section of the act of 1844, ch. 280, by making the affidavit, and paying the sum of ten dollars, as is therein provided, but this does not obviate the objection that the transaction is characterized by a looseness, and want of care, which, looking to the great inadequacy of the price to be paid, should incline the court against giving effect to it.

It cannot, I think, be supposed that Henry knew, not only that he was parting with his property for one-fourth of its value, but that the security which he took for the payment of the purchase money was void, as it was executed and delivered to him.

The petitioner, Farquharson, prays that the deed from Henry Robinson to Mr. Wilson, may be set aside, and that the proceeds of the sale may be paid to him. That part of the prayer which asks for the vacation of the deed, cannot be granted, because, I do not feel myself at liberty in this cause, and upon these proceedings, to decide that question, and to pronounce finally against the deed, nor am I at this time prepared to say that the proceeds of the sales shall be paid to the petitioner for the purpose of investment. The petition, however, will be retained with liberty reserved to pass such future order upon it

as, in the further progress of the cause, may appear to be proper.

The petition of Mr. Wilson prays that the trustee who made the sale, under the decree in this cause, may be authorized and directed, by an order, to credit upon his purchase, the amount of Henry Robinson's interest in the lands so sold. But, as for the reasons stated, I am of opinion, he is not entitled to this relief, his petition will be dismissed.

PRATT and RANDALL, for Wilson.

ALEXANDER, for the Trustee.

JOSHUA HITCH,
vs.
SAMUEL FENBY.

}

DECEMBER TERM, 1850.

[BILL OF REVIEW—PRACTICE—USURY.]

A BILL of review for new facts or newly discovered facts, must aver that such facts came to the knowledge of the complainant within nine months prior to the filing of his bill.

Between the same parties, and for the same matters, a new original bill cannot be brought after a decree has been made in a cause and enrolled, unless it was obtained by fraud.

A decree was passed in 1841 for the sale of certain mortgaged property to pay a balance claimed in the bill to be due on the mortgage debt, which sum was admitted by the answer of the defendants *under oath* to be due. Seven years afterwards, the defendants filed their bill to open this decree upon the ground that it was passed in pursuance of an agreement as a mere security for any balance that might be found due on settlement of their mutual dealings, and then charging usury and other objections against complainant's claim.

HELD—

1st. That after such lapse of time, it would require a very strong and clear case to justify the interference of the court to prevent the alleged fraudulent and oppressive use of this decree.

2d. Not having set up the defence of usury at the time the decree was passed, although he was well aware of the facts upon which the charge is based, and having offered no satisfactory excuse why he did not take the defence then, he cannot be allowed now to open the decree to let in this defence.

Prior to the act of 1845, ch. 352, the plea of usury by the mortgagor or his

alienee to a bill of foreclosure by the mortgagee would have been a full and complete defence.

If a defendant, having the means of defence in his power in an action against him at law, omits to use them and suffers a recovery against him, he is precluded from asking relief in chancery in relation to the same matter.

In equity as at law, parties are required to use due and reasonable diligence, and they will not be permitted to unsay at a future time what they have not only once said, but sworn to.

Upon a supplemental bill, in the nature of a bill of review, the question always is, not what the plaintiff knew, but what, using due diligence, he might have known.

[The bill in this case was filed on the 1st of January, 1848, and its allegations, together with those of the answer, and all the proceedings and facts in the case are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR :

This bill cannot be supported either as a bill of review for error apparent on the face of the decree sought to be affected by it, or upon the ground of new facts, or facts discovered since the decree, and which could not, with reasonable diligence, have been used at the time when the decree passed. There is no pretence of error apparent upon the face of the decree nor of discovery of facts since its date which could not have been used by way of defence at that time. And even if these objections could be surmounted and a bill of review would lie for new facts or newly discovered facts without asking the previous consent of the court, a fatal difficulty would still exist in the fact that the present bill was filed seven years after the date of the decree sought to be revised, without any allegation or suggestion even that the new or subsequently discovered facts came to the knowledge of the complainant within the period of nine months prior to the exhibition of his bill. On the contrary, nothing appears upon the face of this bill to show that every ground relied upon was not fully known to the complainant when the decree of January, 1841, was passed.

The case of *Burch et al vs. Scott*, 1 *G. and J.*, 393, and *Berrett vs. Oliver*, 7 *G. and J.*, 192, are conclusive to show that

a bill of review upon either of the grounds stated cannot be maintained. This bill, then, if it can be maintained at all, must be considered as an original bill in the nature of a bill of review, impeaching the decree upon the ground of fraud, or as a bill asking the court to interfere to prevent its decree from being made the instrument of oppression and injustice. As between the same parties and for the same matters a new original bill cannot be brought after a decree has been made in a cause, and has been enrolled, unless it was obtained by fraud. 3 *Daniel's Ch. Pr.*, 1724.

The bill in the case in which the decree passed, and which decree the present bill seeks to open, was filed on the 16th of January, 1841. It alleges that William Hitch and Joshua Hitch had executed to the complainant there, (who is the defendant here,) two bills of sale of personal property, the one dated the 17th of May, 1838, and the other the 18th of November, 1840, to secure the payment of a large sum of money due from the grantors; that a portion of the property embraced in the conveyances having been sold, and the proceeds applied to the payment in part of the debt, there remained due at the time a balance of \$7580, and the prayer was that the property should be sold for the payment of that balance with interest and costs.

To this bill the defendants, Joshua and William Hitch, filed their answer upon oath, being also signed by both of them as well as by counsel, in which they admit the identical sum claimed in the bill to be due from them, and submit to a decree as prayed.

The answer does not simply admit in general terms that the facts stated in the bill are true, but it admits that the sum due from them on account of said bills of sale to the complainant is \$7580 up to the 6th of January, 1841, as in said bill is expressed.

And two days afterwards, that is, on the 18th of January, 1841, a decree passed for the sale of the property appointing the complainant, Fenby, a trustee for the purpose, and directing a credit to be given for all sums above one hundred dollars. Subsequently, on the 15th and 29th of September, 1842, upon petitions filed by the complainant, and with the consent of the

defendants, orders were passed by the Chancellor, altering, to some extent, the terms and the mode in which the property was to be sold.

Now, the allegation in the present bill is, that the bills of sale and proceedings in chancery were designed by the said parties thereto, and in pursuance of a mutual agreement to that effect, as a security merely to the said Fenby for the repayment of any balance that might be found due to him on a settlement to be made of their mutual dealings, and after this allegation it charges usury and makes various other objections to the claims of Fenby, and seeks to open and vacate the enrolment of the decree for the purpose of an account to be taken between the parties.

The bill, therefore, is not, strictly speaking, an original bill, in the nature of a bill of review, impeaching the decree for fraud because it does not allege that it was obtained by fraud, nor could such allegation be made in the face of the complainant's answer to the original bill, verified by affidavit, but the ground taken is, that the decree, which was obtained for one purpose, is now about to be perverted to another purpose, in fraud of the complainant to this bill.

Conceding that the court at this distance of time would interfere to prevent the fraudulent and oppressive use of a decree to purposes not contemplated by the parties and in conflict with their agreement, (and it certainly would require a very strong and clear case to justify such interference after an interval of seven years,) the question is, whether the complainant has by evidence made out any such case as that charged in his bill?

The substance of the allegation is, that the decree was not given to secure a specific and ascertained sum of money, but merely by way of securing the repayment of any balance that might be found due Fenby on a settlement of accounts. And this allegation is denied by the answer, which says, that at the time stated in this bill he filed his bill in this court for a foreclosure of said bills of sale truly stating the amount then due him to be \$7580. That there was no fraud, deceit or surprise practiced in obtaining the decree, but that on the contrary, it was for money, all of which was justly due him, and was made

up of moneys actually before then advanced to the said Joshua and William Hitch by this respondent, and of debts they owed positively assumed by this respondent, and subsequently paid by him.

It clearly appears, then, if this answer is true, that the decree was not taken simply to secure an unascertained balance, but for a specific sum then actually due, and for other sums assumed by Fenby for the two Hitches as their surety, which other sums he has since paid.

The question is, not whether the decree of 1841 was obtained by fraud, for it is not pretended that it was so obtained, but whether it is now about to be used for a fraudulent and oppressive purpose, and in the consideration of this question, it is immaterial whether any portion of the amount for which the decree was taken was for money then actually advanced or subsequently advanced. For it is clear there would be no fraud or oppression in using the decree to compel the repayment of money for which Fenby was liable as surety, which the decree designed to secure, and which he has since in fact paid.

But the issue in fact made by the bill and answer in the case is, whether the decree of 1841 was given for an arbitrary sum, being intended merely to secure the balance which, upon an adjustment of accounts, should be found due Fenby, or for an ascertained balance then due and to become due as the assumed liabilities should be paid by him. If the parties agreed that the liabilities assumed by Fenby for the Messrs. Hitch should be added to the amount due him for advances then actually made and included in the decree, there could be no objection to it, nor any unfairness in using the decree to compel repayment if those liabilities have since in fact been paid by Fenby.

The bill in this case alleges that the decree was not given for any such ascertained amount, but as a security for such balance as might upon settlement be found due Fenby. This averment of the bill is met by a denial in the answer, and as I read the evidence, there is not sufficient proof to countervail this denial. Indeed, looking to the answer of the two Hitches in 1841, in which upon their oaths they distinctly admit the very sum for

which the decree passed to be due, and I should most reluctantly permit myself to be influenced, by any evidence they could offer, to believe the contrary.

It is not to be tolerated that parties shall make admissions, and fortify those admissions by the highest of all earthly sanctions, and then be allowed to say that they did not mean that which their language confirmed by the most sacred obligation, to speak the truth, plainly imports.

The argument has been pressed that the proceedings which led to the decree of 1841, and the decree itself, are entitled to less consideration than otherwise they would be, because they all appear to be in the handwriting of the same solicitor. It is true they do appear to be so, but it is equally true that the answer of Joshua and William Hitch is signed by themselves in proper person, and also by another solicitor of this court. And when to this evidence of perfect fairness in the conduct of the cause is added the fact that all the admissions of the answer are sanctified by the solemn oath of the defendants there, it surely would require a weight of evidence infinitely stronger than has been produced here to lead to the conclusion that nothing admitted was true, and that all these proceedings are but a solemn mockery. I have read the evidence carefully, and can find nothing in it to shake the conviction which the answer of 1841 is so well calculated to make, that there was then an ascertained sum due Fenby, consisting partly of advances, &c. then made, and of liabilities which he had assumed for these complainants, and which he afterwards paid.

There are, moreover, other circumstances to be found in the proceedings in the original cause, subsequent to the decree of January, 1841, strongly in opposition to the theory of the present bill, that that decree was not for an ascertained sum, but was only intended as a security for such balance as might be found to be due Fenby upon an adjustment of their dealings thereafter to be made.

It appears, as has been shown, that after the decree was passed, to wit: on the 15th and 29th of September, 1842, petitions were filed by the complainant, Fenby, asking for a mod-

ification of the terms and the manner in which the mortgaged property was directed to be sold, and that with the consent of the defendants, Joshua and William Hitch, the terms and mode of sale were changed accordingly. Now, if the ground taken by this complainant is the true one, and the decree of the 18th of January, 1841, was only designed as a security for such sum as might afterwards be found due Fenby, why should the complainant in the succeeding year have applied to the court for an alteration of the terms so as to facilitate the sale, and why, above all, should the Messrs. Hitch, by their answer in writing, have given their consent to such modification? The position now assumed is, that the decree of 1841, was a mere security for an unascertained balance; that it was not to be executed until there should be an adjustment of accounts between the parties; that no such adjustment has been made, and that when the account of Fenby is purged of the usurious charges contained in it, and other objectionable and unfounded items, the entire amount claimed by him will be extinguished. But how can this pretension be reconciled with the fact that within less than two years from the date of the decree, these parties are found concurring in an application to the court to change the terms and mode of sale so as to facilitate its execution? It appears to me, to be no very easy task to reconcile the proceedings referred to with the position now taken by the complainant in this cause, and I am clearly of opinion, he has not succeeded in maintaining the issue in fact presented by the pleadings.

Assuming then, as I do, that the complainant has failed in showing that the decree was taken as security merely for an unliquidated balance, and that he has moreover failed in proving that it is about to be used for a fraudulent or oppressive purpose, there would seem to be no ground upon which he can ask the interposition of this court to open the decree and send the parties to the Auditor for an account.

It is said, however, that conceding the complainant has not succeeded in establishing these grounds, he is yet entitled to have the decree of 1841 opened, and the amount reduced by striking from the claim of Fenby, the usurious interest with which it is alleged he charged Joshua and William Hitch.

In considering this ground of equity, it must be remembered, that the complainant in this bill does not intimate any where that he was not as well aware of the facts upon which the allegation of usury is based in 1841, when he consented to the decree, as he is now, and no satisfactory reason is given why he did not make the defence then. He says, to be sure, that the decree then confessed was only designed as a security for some floating balance of accounts, but this ground I have already shown is untenable in point of fact, and, therefore, as I conceive, the complainant is without sufficient excuse for not only failing then to rely upon this defence, but for actually, under oath, admitting that he owed the sum claimed in the bill, and consenting to the decree.

There can of course be no doubt whatever, that prior to the act of 1845, ch. 352, the plea of usury by the mortgagor, or his alienee to a bill of foreclosure by the mortgagee, would have been a full and complete defence. *Trumbo vs. Blizzard & Jacobs*, 6 G. & J., 18. Having omitted to make this defence at the proper time, and having, on the contrary, admitted the claim and consented to the decree, the question is, shall he, seven years afterwards, be allowed to open the decree upon this ground, and institute an examination into a matter which, by the decree, was supposed to be finally settled. There can be no doubt that a judgment at law, under such circumstances, would not be disturbed. If a defendant having the means of defence in his power in an action against him at law, omits to use them, and suffers a recovery to be had against him, he is precluded from asking relief in chancery in relation to the same matter. *Gott & Wilson vs. Carr*, 6 G. & J., 309. This is the undoubted rule in regard to judgments at law, and I can conceive of no reason why the decree of this court should be dealt with in a different way. Why should parties be permitted to come into this court, and not only omit in due time to present their defence, but admit they have no defence to claims made against them, and then years afterwards be allowed to say that these omissions and confessions amount to nothing, and that at the very time they were made there were grounds of defence upon

which they could, if they would, have successfully relied? Such, I am persuaded, is not the law of this court, but that here, as at law, parties are required to use due and reasonable diligence, and especially they shall not be permitted to unsay at a future time what they have not only once said, but sworn to. Respectable authority can be found for the principle that a bill of review cannot be brought against a decree taken by consent for *consensus tollit errorem*. 3 *Daniel's Ch. Pr.*, 1726. As observed by Chief Justice Savage, 1 *Hopkins*, 105, "upon a supplemental bill, in the nature of a bill of review, the question always is, not what the plaintiff knew, but what, using due diligence, he might have known." And, in this observation he is sustained by the authorities referred to by him. Indeed, the very language is used by *Lord Eldon* in *Young vs. Keighly*, 16 *Ves.*, 353, and it received the express sanction of *Chancellor Kent*, in *Livingston vs. Hubbs et al*, 3 *Johns. Ch. Rep.*, 124. The rule, indeed, is so perfectly reasonable, that authority can hardly be necessary to sustain it. There must be an end of litigation, and this would never be the case if parties were permitted to confess judgments or decrees, and then have them reopened to contest facts in their knowledge at the time, or the knowledge of which, with reasonable diligence, they might have acquired.

My opinion, therefore, is, that no ground has been shown for opening or disturbing, to any extent, the decree of 1841, and I shall, therefore, dissolve the injunction, and give the defendant, Fenby, the liberty to proceed upon his decree for the sum which appears, by his answer and exhibit filed with it, to be due. Other grounds were taken in the argument upon which I do not purpose expressing an opinion.

ALEXANDER and DULANY, for Complainant.

SPEED and GLENN, for Defendants.

CHARLES H. CARTER
 vs.
 CHARLES B. CALVERT,
 GEORGE H. CALVERT ET AL.

DECEMBER TERM, 1851.

[ARBITRATION—AWARD.]

By arbitration bonds executed in 1846 between complainant and the executor of G. C., it was recited, that complainant, in right of his wife, claimed to be entitled to certain portions of the estates "of the *father*, aunt, and other relations and ancestors" of the mother of his wife, which had come to the hands of said executor, and that the parties had mutually agreed to refer "all the *differences* between and among them, and *all said claims* as aforesaid" to arbitrators, "in order to avoid litigation," &c. A settlement had been made in 1836, between complainant and G. C., in his lifetime, in reference to the *paternal* succession of complainant's wife, which was *consummated by deeds* and other writings, and had ever since been *acquiesced in* and regarded by all parties as *final*. **HELD—**

That as there might have been, or the parties to the arbitration might have supposed there was, some portion of the *paternal* succession which had come to the hands of the executor, besides that embraced in the settlement of 1836, the arbitrators transcended their power in disturbing that settlement.

The award found a certain sum due by G. C. at his death to complainant, and that "payments to a considerable amount had been made by" the executor "on account thereof" since the death of said G. C., "for which he is entitled to credit thereon," and then awarded "that a fair account be taken between the parties of the balance due, if any," without stating by whom the account was to be taken, or within what time, or upon what principles. **HELD—** That the award was void because it did not make a final determination of all the matters submitted.

The reservation of a future power by the arbitrators in their award, if it affect the whole of the award, will render it totally void, because the award itself should close up all matters submitted.

But the reservation of a mere ministerial act, such as an arithmetical calculation, and not a judicial question, will not have the effect to vitiate the award.

[The bill in this case was filed by the complainant on the 1st day of February, 1849.]

It states that in 1799, George Calvert married Rosalie Eugenia Steer, daughter of Henry Joseph Steer, of Antwerp, and had by her five children who survived their mother. That prior to and in contemplation of said marriage, a marriage settlement was made, dated the 8th of June, 1799. That Henry Joseph

Steer and his daughter Rosalie died in 1821. That George Calvert died in 1838, and the defendant, Charles B. Calvert, is his executor. That on the 11th of November, 1830, complainant married Rosalie Eugenia Calvert, one of the children of the above marriage, by whom he has issue, who are made defendants. That on the 13th of January, 1832, complainant and his wife, in furtherance of an antenuptial agreement between them, conveyed to B. M. Caton and George H. Calvert all the estate to which his wife was entitled at the time of her marriage under the will of her grandfather, Henry Joseph Steer, and certain other estate to which she would be entitled on the death of her father, by virtue of the marriage settlement above referred to, between her father and mother, with certain other property and all other moneys and other property which she might thereafter inherit or take by devise from her relatives in trust for the sole and separate use of the wife during her life, and after her death to such uses as she might appoint ; and that on the 21st of July, 1840, by a decree of this court, the said trustees were removed, and Charles B. Calvert and Robert E. Lee were appointed in their stead.

That on the 12th of November, 1836, by deed of that date between George Calvert of the first part, complainant and wife of the second part, and George H. Calvert and Robert E. Lee of the third part, the said George Calvert conveyed to the parties of the third part a tract of land called "Godwood," and forty-two slaves, in trust for complainant's wife, and the same were, with his consent, accepted by his wife in liquidation and satisfaction of certain money and effects in the hands of said George Calvert due and owing to complainant's wife, and that the possession of said land and slaves had long previous to the execution of said deed been delivered to his wife, and that since that time they have held the possession conformably thereto, and that in fact the debt so liquidated and satisfied was due and owing to his wife by her said father on account of certain moneys and effects received by him on her account from the executors of her maternal grandfather, and that the statement of the amount of said debt made by the said George Calvert

was acquiesced in without any particular examination thereof because of the near relation of the parties, and the confidence reposed by a daughter in her father, and the same was never at any time afterwards questioned by complainant, or his wife, or her father.

That said George Calvert, in virtue of the marriage settlement between him and his wife, and as surviving husband, became possessed of a large amount of money and effects upon the division of the estate of the mother of his said wife, which he was entitled to hold for life only, and which after his death was to be accounted for and distributed amongst his children by his said wife, and in order to secure said money and effects to his children, to be paid after his death, he did, on the 11th of November, 1837, by deed of that date, convey to his sons, George H. and Charles B. Calvert, certain real and personal property upon trust, that if he, before his death, or his legal representatives in due time thereafter, should not well and truly account, pay and satisfy to his said children their respective shares of the estate of their maternal grandmother for which he was liable, then the grantees might sell the same and pay to complainant's wife for her separate use, or to the trustee named in the marriage settlement between her and complainant, every such sum or sums of money, stocks, security, property and effects as might be then due and coming to her in the premises, and complainant charges that the moneys and effects of his wife's maternal grandmother which came to the possession of said George Calvert, amounted to \$100,000 and upwards, and that he has no means of ascertaining the amount and value accurately, but said George H. and Charles B. Calvert, or one of them, have full knowledge of the subject, and can state the amount and value, and what said effects were, and have also copies of the marriage settlement referred to in said deed, and he further charges that said George Calvert did not in his lifetime, and his representatives since his death have not, nor have the trustees in said deed, accounted with, or paid to complainant's wife, or her trustees, her share of the moneys and effects of her maternal grandmother, which so as aforesaid came to the posses-

sion of her father, in consequence of a difference between complainant and said Charles B. Calvert as to the amount and value of said share.

That complainant's wife died on the 10th of January, 1845, leaving seven children, (who are named,) all minors, and that before her death she duly executed her will or appointment, by which she devised all her estate, including that vested in the trustees named in her marriage settlement, to complainant for life, with remainder in fee to her children, with power to complainant to make distribution among her children, as he might think just. That the trustees in the deed of the 11th of November, 1837, are, by the terms and true construction thereof, bound, but have failed, to raise, pay over and deliver to the trustees in the marriage settlement between complainant and his wife, her share of the moneys and effects of her maternal grandmother, to be disposed of according to the terms of her will or appointment.

The bill then makes the said children of complainant, and Robert E. Lee, Charles B. and George H. Calvert, defendants, and prays for a discovery of the marriage settlement between George Calvert and his wife, for an account of the moneys and effects of the maternal grandmother of complainant's wife, which, under said settlement and as surviving husband, came to the possession of said George Calvert for his lifetime, and which his representatives are bound to restore undiminished, or the value thereof, to his children; that the trustee, in the marriage settlement between complainant and wife may be decreed to be entitled to her share of the said moneys and effects of her maternal grandmother, to be by them disposed of in conformity with her said will or appointment, and that the property covered by the deed of trust of the 11th of November, 1837, be sold for the payment of said share, or the value and amount thereof, and for further relief.

The answer of Charles B. Calvert, which was adopted by his co-defendant, George H. Calvert, admits the marriage of his parents, and of his sister to the complainant, and the issue thereof, and their survivorship as stated in the bill, that a mar-

riage settlement was made by his parents, the death of Henry Joseph Steer and wife in 1821, and the death of his father in 1838, leaving a will, of which he is the executor. It also admits the conveyance by complainant and wife after their marriage, to B. M. Carter and George H. Calvert, of certain property in trust as appears thereby, and that defendant and Robert E. Lee were afterwards, by decree of this court, appointed trustees to execute the trusts of said conveyance in place of those named therein.

It also admits the conveyance of the 12th of November, 1836, by George Calvert to B. M. Carter, and George H. Calvert in trust for complainant's wife, but denies that it was made by the grantor, or was by complainant and his wife, or either of them, accepted and received exclusively in liquidation and satisfaction of any money or effects in the hands of the grantor for or belonging to the said wife, and then payable by him to her, or on her account, or any claim in certain of said wife against the said grantor. On the contrary, defendant is informed and believes that said conveyance was made by the said George Calvert, and accepted by the complainant and wife as payment or satisfaction primarily of their claims against him for money which was then payable by him to them, and also on account of all claims which they might thereafter have against him for moneys which might thereafter come into his hands and for which he or his estate might thereafter become liable to them. He admits possession of the land and negroes by complainant and wife prior to the date of the conveyance, and that they have retained possession since, and that in view of this conveyance some statement or estimate was made of the probable extent of the claims of complainant and wife against the said George Calvert for moneys then payable by him to her, but he denies that such statement or estimate was correct in fact, or was carefully taken, or designed by the parties to be conclusive, since it was understood that at a future day complainant and wife would have further claims against the said George Calvert or his estate, at which time any error might be corrected, and he admits that said statement was not particularly examined by the complainant, or

admitted to be correct by him, but on the contrary he avers that complainant admitted the said statement or estimate was not a conclusive settlement as is now pretended.

He admits that said George Calvert, in virtue of the marriage settlement between him and his wife, and as surviving husband, became possessed of moneys and effects of considerable value which he was entitled to retain and enjoy during his life, but which after his death were to belong to and be distributed amongst his children, and that on the 11th of November, 1837, he conveyed to said Charles B. and George H. Calvert certain property in trust to provide thereout for payment of the claims of his children against him as therein stated. He also admits the death of complainant's wife as stated in the bill, and that she left children who are correctly named therein, and also a last will whereby all her estate is devised to complainant for life, with remainder to her children.

He denies that he ever refused to account with the complainant for the claims of his wife, which were intended to be provided for by the deed of trust from said George Calvert to George H. Calvert and defendant. On the contrary, being in possession of the trust estates, and having engaged with his brother, the said George H. Calvert, to provide for any claims of the complainant against their deceased father, he did from time to time make large payments to complainants on account, and so soon as it was discovered that said claims involved important and difficult questions, it was agreed by and between the complainant acting for himself and children, and the defendant for himself and brother, that all claims and demands of the complainant and his children against the said George Calvert, deceased, should be left to the friendly arbitrament and award of Richard S. Coxe and Joseph H. Bradley, with power to them, in case of disagreement, to appoint an umpire, and accordingly, on the 28th of July, 1846, complainant gave to defendant his bond to stand by the award to be made as aforesaid. He avers that complainant proposed said reference, and procured said bond, to be prepared by his own counsel in such form as to refer all questions arising as well out of the paternal as maternal

successions, and he relies on this bond so prepared as demonstrating most clearly that at the time of said reference the complainant did not suppose the conveyance aforesaid was designed as a full and complete settlement and satisfaction of any one or other of the claims of complainant and wife as is now pretended.

He further avers, that on the 20th of January, 1848, the said arbitrators, with George M. Bibb, the umpire selected by them, made their award, after due consideration of all the pretensions and proofs of the parties, and thereby awarded that the said George Calvert, at the time of his death, on the 28th of January, 1838, was indebted unto complainant's late wife in the sum of \$8039 51, and that from the said sum there should be deducted the sums which had been paid on account to complainant by defendant since the death of the said George Calvert, and he avers that the statement C. B. C., No. 4., filed with the answer, contains an accurate account of the payment made to complainant prior, and up to, the time of its preparation, and that the original was prepared and laid before the arbitrators anterior to the date of their award, and with the knowledge and consent of the complainant, and for the purpose of said reference, and that to ascertain the precise sum now to be paid to complainant by defendant, it was only necessary to discount from the sum so awarded, with interest, the several sums shown by said exhibit to have been paid by defendant. But he avers, that after preparing the original of said exhibit, he has paid to complainant further sums amounting to \$810 15, and he insists that the balance which may remain after making all such deductions is all that is now due from defendant as representing his deceased father, and from his father's estate to the complainant and other representatives of his said wife, and pleads and relies upon said award as a full answer and bar to all the relief prayed by the bill. He avers, that this award was made after a patient examination and consideration by the arbitrators of the allegations and proofs laid before them by the parties, and defendant believes it truly and correctly states the amount due from the said George Calvert, deceased, at the time of his death,

to complainant's late wife, and he, as one of the trustees appointed by this court, in behalf of complainant and his children, is inclined to adopt said award as a final adjustment of all claims and demands as aforesaid, and he further avers, that after the award was made, complainant requested defendant to make out a statement of the balance due him agreeably to the award, which he did, but complainant then declined submitting to the award, and defendant was, therefore, unable to comply with his part by payment of the balance due as aforesaid. And since that time he has been advised that as complainant is entitled to no more than a life estate in the sum so awarded, it ought to have been retained and invested by said defendant and his co-trustee, under the direction of this court, and that complainant ought now to be required to pay over to defendant and his co-trustee the moneys so paid by defendant, to be invested as aforesaid.

He further avers, that exhibit C. B. C., No. 3, filed as part of his answer, is a copy of a statement prepared by him, and laid before the arbitrators as exhibiting correctly the payments made by said George Calvert in his lifetime, to complainant and his wife; that this statement was examined by complainant, and by him admitted to be correct, and was used by the arbitrators in making up their award. That complainant and his wife are therein charged in account with the land and negroes before mentioned, at certain conventional prices, which form parcels of the aggregate claimed to have been paid and advanced as aforesaid, by the said George Calvert in his lifetime, and that the only objection made by complainant before the award was made up, was the item for 160 acres of land therein charged, at the price of \$35 per acre, whereas the complainant insisted the charge should have been at the rate of \$30 per acre, and no more, and, therefore, a memorandum was made at the foot of the statement by, or at the instance of complainant, "deduct 160 acres at \$5," the object of which was to advertise the arbitrators that to the extent of said deduction claimed, but no further, the said statement was controverted. That it was further agreed between the complainant and him-

self that said item should be withdrawn from the consideration of the arbitrators and adjusted between the parties, and the arbitrators in consequence of such agreement, in making up their award gave complainant the benefit of the deduction. That after the award had been settled, and made known to the parties, but before the parts had been delivered, the complainant insisted that said land and negroes had been taken in satisfaction of a certain claim against the said George Calvert for moneys at that time in his hands, and which he was then bound to pay over, and that the award was wrong in bringing the value of said land and negroes into the account, with the claim which was intended to be liquidated thereby, to which it was answered by the said arbitrators, or one of them, that the bond of submission expressly declared that all claims on account of the paternal succession were submitted to the decision of the arbitrators, and that the said statement, with the privity and consent of the complainant, had been laid before the arbitrators as a true state of credits to which the defendant would be entitled on account. But that, at his instance, the parts of the award would be retained to enable complainant to exhibit proof of his assertion that said land and negroes had been given in satisfaction of the aforesaid claim, and not on account simply; that no such proof was offered, and after the lapse of the time prescribed, the parts of the award were delivered, and, therefore, defendant insists, that upon all the circumstances, the complainant ought to be concluded by said award.

He further avers, that he has always been, and is now, ready and willing to settle and adjust the said reserved item, and he insists that he is entitled to a further allowance for the said sum so reserved as a further deduction from the amount awarded against him. He submits to account with complainant and his children on the basis of the award, and to bring in, or invest, or apply under the direction of the court, the residue of the money awarded against him, after taking proper allowances for the payments made by him, and for the said disputed item, and he prays that the complainant may be required to bring into court the sums erroneously paid him by defendant as aforesaid,

to be invested and secured under the direction of this court, and that the award may be established, as well against the complainant, as his children, and their trustees.

The arbitration bonds were filed as exhibits with the answer, and their recitals are fully set out in the opinion of the Chancellor. The award made by the arbitrators and George M. Bibb, the umpire selected by them, on the 20th of January, 1848, after reciting the submission, makes the award set out in the opinion of the Chancellor.

There was also filed with the answer exhibits C. B. C., Nos. 3 and 4, the first being a statement of payments made to complainant and wife by George Calvert in his lifetime, with the memorandum at the foot, "deduct 160 acres at \$5," referred to in the answer, the second a statement of payments made by Charles B. Calvert, executor of George Calvert, to the same parties.

The answer of the infant defendants was taken by guardian, *ad litem*, not admitting the allegations of the bill, and asking the court to protect their interests. The answers of the other parties are immaterial.

A large mass of testimony, both oral and documentary, was then taken, the substance of which is stated in the Chancellor's opinion. It may be proper, however, to add, that the settlement in reference to the paternal succession referred to in the proof of R. H. Stewart, and in the opinion of the Chancellor, was made in 1835, the amount due being ascertained by Walter Jones, Esq. and Charles B. Calvert, acting as agent for his father, and if this settlement had not been disturbed by the award the amount which the arbitrators would have adjudged as due the complainant would have been \$12,037 54, as of the 12th of January, 1838. It was further proved by one of the arbitrators that they never gave notice to the parties of the time and place of any of their meetings.]

THE CHANCELLOR :

Whatever may be said of several of the questions raised and and discussed by the counsel on both sides in this case with so

much ability, there can, I think, be no reasonable doubt that the settlement between the elder Mr. Calvert, and his daughters, Mrs. Carter and Mrs. Stuart, made in the year 1836, was intended to be, and was considered on all hands, as a full and final adjustment of all the claims of the daughters against their father for, or in respect of, moneys and property which had come to his hands from the executors of their maternal grandfather. The evidence on this point, both documentary and oral, is too conclusive to be susceptible of misapprehension, and I am quite satisfied that when, in 1846, it was agreed to refer to Messrs. Coxe & Bradley certain matters then in difference between Messrs. Carter and Stuart and Mr. Charles B. Calvert, as the legal representative of his father, George Calvert, then deceased, it was not the understanding of the two first named gentlemen, that the settlement of 1836, was one of the subjects to be submitted to the arbitrators. And in truth the evidence shows very clearly that Mr. Charles B. Calvert himself, regarded the settlement in question final until the execution of the arbitration bond, which, as he stated to Dr. Stuart, "he thought opened the whole question as to the first claims as well as to the last, that is, those which were due by his father before his death, and which were included in the settlement of 1836, as well as those which became due after his death."

That Mr. Charles B. Calvert, at the time of the execution of the arbitration bond, was under the impression that the subjects of the paternal, as well as maternal, successions were to be submitted to, and would be examined by, the arbitrators; there can, therefore, be no doubt, but it is equally apparent, that he formed this impression not from any understanding, agreement or negotiation between himself and the opposite parties prior to the execution of the bonds, but from the terms of the bonds themselves, which he thought opened both questions, and required the arbitrators to re-examine and correct, if found to be erroneous, the settlement of 1836. This, of course, was the impression of Mr. Charles B. Calvert, but there is not, in my opinion, the slightest ground for supposing that the other parties to the submission entertained similar views. Certainly

there is nothing in the evidence of Mr. Bradley, when he speaks of the conversation between himself and Mr. Carter, which can lead us to suppose that the latter objected to the right of the arbitrators to go behind the settlement, because he had ascertained, or apprehended, that the result of a re-examination of the questions then adjusted would be disadvantageous to him. On the contrary, Mr. Bradley distinctly states, that he declined to let Carter know the result of the arbitration, though he requested him to do so. Why Mr. Carter asked the witness if they had gone into the question of the paternal succession it is impossible to ascertain with certainty. We may speculate upon this subject as we please, but whatever his motive was, it seems to me, a constrained and unnatural conjecture to attribute his remark, that the arbitrators had no right to examine into that question to a conviction, or even an apprehension, that he could suffer by their doing so.

If, as the argument assumes, Carter consented by the submission that the accounts upon which the settlement of 1836 was made should be raveled into because he had reason to think a re-examination would result favorably to him, why should he, before the result was known, protest against the power of the arbitrators to do so? There is nothing to show that, from the period of the submission to the date of his conversation with Mr. Bradley, any thing had come to his knowledge in reference to the probable result of a reinvestigation of the old settlement, which would induce him to retract his consent to such reinvestigation after he had once consented to it.

There is, moreover, no reason, that I can conceive, why the settlement of 1836 should be brought in question between these parties, and the matters which were then supposed, all round, to be finally adjusted, laid before these arbitrators for their examination. The settlement was certainly made under circumstances calculated to remove all doubt or suspicion of its perfect fairness.

The amount ascertained by it to be due from the late Mr. Calvert to his daughters, was determined by an eminent legal gentleman, acting by the appointment of, and as the mutual

and trusted friend of the parties, and the property taken by his daughters, in full satisfaction of the claim, was appraised by mutual friends, or its value otherwise fixed, so as to ensure entire and full justice of all parties. And Mr. Carter and his wife, in pursuance of the agreement to that effect, upon receiving a conveyance of the property agreed to be taken in satisfaction of their claim, had actually released and exonerated Mr. Calvert fully and finally therefrom.

This final and full settlement of the claims of Mrs. Carter upon her father, founded upon rights under the paternal succession, was consummated by the deed of the 12th of November, 1836, in which all the necessary parties united, and from that day down to the date of the arbitration bonds on the 28th of July, 1846, no one ever thought the subject would ever again be agitated. Mr. and Mrs. Carter had been in the actual possession of the property thus conveyed in satisfaction of this claim from a period anterior to the deed, continued in possession thereafter, and Mr. Carter is now in possession thereof, claiming title thereto in virtue of rights conferred by that deed. No complaint has even to this day been heard, and the parties, father and daughter, and those who have succeeded them remained under the impression, as well they might, that this matter was closed forever.

There is a reason of great force, as it appears to me, why Mr. Carter should not have ventured to open a question which had thus been closed in the lifetime of his wife, who died in the year 1845, and who certainly died under the impression that that subject at least would never be disturbed. Mrs. Carter had by her will executed the power conferred upon her by the deed of the 12th of November, 1836, and had, in pursuance of said power, given her husband a life estate in the property embraced in said deed, with remainder in fee to her children, with power to the father to make such distribution among her children as he might think just. Now, it appears to me it would have been eminently injudicious, not to say improper, in Mr. Carter to do any act which could by possibility, in any of its consequences, affect the title of his wife to the property thus disposed of by her will. Suppose these arbitrators, Messrs. Coxe and Bradley,

had ascertained nothing was due Mrs. Carter on account of the paternal succession, or no more was due from the deceased, Mr. Calvert, on that account than he had paid in money, would not such an award have been calculated to shake the title conveyed by the deed of November, 1836, or at all events, would it not so far as Mr. Carter is concerned, have thrown doubts upon his title as resulting from that deed? The reference of this question could not, to be sure, have impaired the rights of the children of Mr. Carter, who were minors and no parties to the submission, but it certainly seems to me by no means a clear proposition that if Mr. Carter had agreed to open the settlement, and that the arbitrators should re-examine the question, and they had come to the conclusion that no consideration was given for the deed, that his rights under it as derived from the will of his wife could not have been affected.

Certainly it is to be presumed Mr. Carter would have felt much reluctance to submit to the contingency of a new arbitration, a subject which had been thus solemnly settled in the lifetime of his wife, in the confidence of the final character of which she had made her will, and had gone to her grave.

There is moreover another reason entitled, in my judgment, to much consideration in determining the intention of the parties to this reference. Mr. Calvert the elder died early in the year of 1838, but on the 11th day of November, 1837, he executed to his sons, George H. and Charles B. Calvert, a deed of his real and personal estate in trust to secure to the grantees the sums due from him to them on account of their maternal grandfather, and also to secure his said sons and his daughters the sums which would be due them upon his death, and which he had received from their maternal grandmother. This deed was, of course, executed by the grantor, and received by the grantees, under the impression that the paternal succession of the daughters had already been accounted for and paid by Mr. Calvert, for it makes no provision for their payment in respect thereof, and it may perhaps well be doubted whether the trustees acting under that deed would have been perfectly justified in doing any act which would revive this claim or subject the

trust property to its payment, and yet if that claim had been submitted to the arbitrators, and they had awarded that more was due Mrs. Carter than she received under the settlement of 1836, it would be unjust to exclude her from the security of the property conveyed by the deed. The evidence relied upon by the defendant to show that Carter did agree, and expected that the settlement of 1836 should be opened, I do not think sufficient to overthrow the strong presumptions and positive proof the other way. The proof principally relied upon is found in the paper C. B. C., No. 3, and the evidence showing a correction by Carter of one of the items in the account written upon that paper. The account professes to be an account of moneys and property paid to, and charged against Mr. and Mrs. Carter, by George Calvert in his lifetime, commencing in June, 1833, and terminating in January, 1836. The charges amount in the aggregate to \$40,011 92. One of the items is a charge for one hundred and sixty acres of land described as "Allen's Purchase," at \$35 per acre, amounting to \$5600. The property and money embraced in this account was the consideration of the deed of the 12th of November, 1836, and the evidence shows that Mr. Carter corrected the account by deducting for one hundred and sixty acres at \$5 per acre, thereby reducing the sum of the debits to \$39,211 92, and this, it is strongly urged, is a recognition of the right of the arbitrators to ravel into and readjust the settlement of 1836, which resulted in, and was consummated by the execution of the deed of that date.

It does not appear to me, however, that this act can or ought to have the effect imputed to it. I cannot bring myself to think that if Mr. Carter had supposed that the settlement of 1836 was to be disturbed, and the arbitrators were to enter into an examination of the accounts upon which it was founded, that he would have contented himself with simply correcting a single item in the account. The account which was furnished by the defendant does not give the credits. It is simply a statement of the charges made by the late Mr. George Calvert against Mr. Charles H. Carter and his wife, and it is extremely difficult to conceive that if the latter gentleman had supposed that the

old settlement was to be ripped up, and the whole question re-examined, he would have been satisfied with correcting a single item in the statement of charges. He did not know, nor could he have known, what evidence was before the arbitrators, or upon what grounds they would proceed in determining the indebtedness of Mr. Calvert, growing out of the paternal succession of his wife, and when we consider how vitally important the question was to him and his children, it requires no little amount of credulity to believe that he would have made no inquiry upon the subject, but have left the arbitrators to decide the whole matter upon evidence of which he was entirely ignorant.

But it is insisted upon the part of the defendant, Mr. Charles B. Calvert, that by the express terms of the submission in this case, the paternal as well as the maternal succession of Mrs. Carter was referred to the arbitrators, and that all reasoning upon the subject founded upon probabilities and conjecture is unavailing. The agreement to submit, is to be found in bonds interchangeably executed and delivered by the parties each to the other. The bonds recite that "whereas the said Charles H. Carter and R. H. Stuart, in right of their respective wives, daughters of George Calvert and Rosalie Eugenia Calvert, deceased, and the children of the said Charles H. Carter, by virtue of the last will and testament of their mother, claim to be entitled to certain portions of the estates of the said George Calvert and Rosalie Eugenia Calvert, and of the father, aunt, and other relations and ancestors of the said Rosalie Eugenia, which estates have come to the hands of the said Charles B. Calvert, as the legal representative of his said father, George Calvert, deceased, and whereas the said parties have mutually agreed that all the differences between and among them, and all said claims as aforesaid, shall be left to the friendly arbitrament and decision, according to the principles of law and equity, of persons mutually to be chosen by them in order to avoid litigation," &c., and the parties, in the penalty of thirty thousand dollars, bind themselves respectively each to the other to abide by and perform the award of the arbitrators.

It is urged here that the terms "father, aunt, and other rela-

tions and ancestors of the said Rosalie Eugenia," who was the mother of Mrs. Carter, the right is expressly conferred upon the arbitrators to adjudicate both the paternal and maternal successions, and this presents, as it seems to me, the only difficulty in the case.

It is contended that if the paternal succession was not intended to be submitted, why was the word "father" introduced in the contract, and there would be great difficulty in answering this argument if there was no subject upon which that term could operate but that portion of the paternal succession which had been settled in the year 1836. But Mr. George Calvert lived until the year 1838, and it may have happened, or at any rate it might have been supposed that some portion of the paternal succession of his deceased wife came to his hands between the time of the settlement and his death.

There is no evidence upon the subject either way, but there is certainly nothing very unreasonable in supposing that the parties to the submission designed to provide for such a contingency. At all events, I think that hypothesis is quite as reasonable as the supposition that the parties should have intended in 1846 to overturn a settlement made in 1836, against which no whisper of complaint was ever heard from any quarter, and which had been carried into full and complete execution by the most formal and solemn instruments known to the law. That settlement unquestionably was not a matter of difference between the parties, and it was only the matters in difference which were designed to be submitted, in order that litigation among members of the same family might be avoided. I am, therefore, of opinion that the arbitrators transcended their power in disturbing the settlement of 1836, and that their award for that reason is no bar to the relief prayed by the bill.

There is, moreover, another objection to this award, which may be and has been taken in this case, and which, in my judgment, is insuperable. The objection is not that the arbitrators proceeded irregularly or improperly in not giving notice to the parties of the times and places of their meeting, which, perhaps, though a ground for setting aside the award in a proper pro-

ceeding for the purpose, does not render it void. *Watson on Awards*, 119, 120. The objection referred to is, that the award does not make a final end and determination of all the matters submitted, and is, therefore, not binding upon the parties.

The arbitrators first find that at the death of George Calvert on the 28th of January, 1838, there was due from him to Rosalie Carter, wife of Charles H. Carter, the aggregate gross sum of \$8039 51, and to Julia Stuart, wife of R. H. Stuart, the gross sum of \$7426 69, and they further find "that payments to a considerable amount have been made by the said Charles B. Calvert to the said Charles H. Carter and R. H. Stuart, respectively, on account of the several and respective sums of \$8039 51, and \$7426 69, since the death of the said George Calvert, for which he is entitled to a credit thereon." And they further award, "that a fair account be taken between the said parties of the balance due, if any, on account of the said respective sums of money, so far as aforesaid due by the said George Calvert at the time of his death, and that the same be paid forthwith to the said Charles H. and R. H. respectively."

The amount, therefore, to be paid by Mr. Charles B. Calvert, was to depend upon the result of an account to be taken thereafter; by whom, and within what time, and upon what principles, is not stated. But a reservation of a future power by the arbitrators in their award, if it affect the whole of the award, will render the award totally void. This is the case even if the reserved power is to be exercised by the arbitrators themselves, as is conclusively shown in the cases referred to in *Watson on Awards*, pages 104 to 108, because the award itself should close up all the matters submitted, leaving nothing open to be settled by matter subsequent. This award, however, is more obnoxious to objection, because it does not appear by whom the account is to be taken, nor within what time, nor upon what principle. In fact, the great object of the parties, which was to ascertain the amounts due by a friendly reference of the matters in difference between them to mutual friends is defeated if, notwithstanding the award, an account is to be taken. It is no answer, as it seems to me, to say that there was no dispute

in fact between the parties in regard to the payments made by Mr. Charles B. Calvert to his brothers-in-law after the death of his father. That does not appear upon the face of the award itself, nor by reference to any documents or schedule appended to it, or in any way made a part of it. If the award had referred to the paper marked C. B. C., No. 4, and had directed the payments there mentioned to be credited against the sum awarded, so that the result would have depended upon a mere arithmetical calculation, the case might have been different, because that perhaps would have been reserving a mere ministerial and not a judicial question, and thus brought it within that class of cases referred to in *Watson on Awards*, 105, 106. But to take an account was certainly not to perform a mere ministerial act. It was, in fact, the very thing the arbitrators themselves were to do, and which the parties to the submission preferred to have done by them than by a resort to the ordinary judicial tribunals.

This is an objection which I think is fatal to the award, renders it totally void, and which, consequently, removes it from the way of the plaintiff in this case.

The only remaining question which I deem it proper in this case to notice, relates to the claim of the plaintiff to a portion of the damages paid by the Railroad Company for the right of way through certain lands. It appears by an extract from the deed executed by George Calvert, deceased, to the Baltimore and Ohio Railroad Company, dated the 4th of March, 1834, (which it is agreed shall be taken in lieu of the whole deed,) that for the consideration of eleven thousand dollars he conveyed to the Company all his interest, both at law and in equity, in and to two parcels of land as therein described, for the sole purpose, as expressed in the deed, of the passage and construction of the road through said lands, which lands, as appears by an agreement filed on the 17th instant, belonged in part to the children of Mrs. Calvert, and in part to George Calvert, the grantor, and the question raised is, whether the children of Mrs. Calvert, of whom the complainant's wife was one, are entitled, as against the representatives of George Calvert, to re-

cover any portion of the money so paid to him by the Company, and if so, the agreement shows the proportion, or gives the *data* by which the amount may be ascertained.

My opinion is, that there can be no recovery against the representatives of Mr. George Calvert in respect of this money. Whatever may have been the intention and purpose of the parties to the deed, it is very certain that Mr. Calvert could only convey to the Company his own title to the land, and the deed, in fact, professes to convey nothing more. It does not attempt to convey the title of his children, and if it did, the materials are not before me by which I could confirm the contract, considering it a contract made for or on behalf of infants, and embraced within the provisions of the twelfth section of the act of 1785, ch. 72, which authorizes the court to confirm contracts made for or on behalf of infants, when, upon examination of all the circumstances, it shall appear for their interest and advantage to do so.

It will become necessary, I presume, to send the case to the Auditor, to state an account ascertaining the amount due from the defendant, Mr. Charles B. Calvert, as the legal representative of his father, or from him and his co-trustee, George H. Calvert, on account of the estate of the maternal grandmother of the deceased, Mrs. Carter, but as I understood in the course of the argument that some agreement would probably be made which would facilitate the account, I will not at this time pass an order.

The bill does not raise the question, and I do not propose at this time to express any opinion in reference to the trust created by the marriage settlement of the 13th of January, 1832.

J. M. CAMPBELL and R. JOHNSON, for Complainants.

THOMAS S. ALEXANDER, for Defendants.

[The parties not being able to make any agreement as indicated in the opinion, the Chancellor subsequently passed an order referring the cause to the Auditor to state the account as above decided. From this order the defendants appealed, and this appeal is still pending.]

RICHARD J. CRABB, ADM'R D. B. N.
OF FRANCES H. HARRIS AND OTHERS }
vs. } DECEMBER TERM, 1846.
SAMUEL MOALE AND OTHERS.

[PRIORITY OF PAYMENT OF LEGACY AND ANNUITY.]

A TESTATOR, by his will executed in 1786, gave to his wife a legacy of £2250, and an annuity of “£500 during her natural life, to be secured to her out of the rents of his estate,” and devised to his brother the residue of his estate, “after the above will is complied with.” The legacy being unpaid and the annuity in arrear, a decree was passed in 1790, charging the rents of all the lands of the testator, with the payment of the annuity due and to become due, *in the first place*, and *after said payment*, declaring the reversion chargeable with the payment of the legacy. The property was subsequently sold, and the proceeds proved insufficient to pay the arrears of the annuity.

HELD—

That both the legacy and annuity are by the decree of 1790, treated as a charge upon the real estate of the testator in the hands of his residuary devisee, and the same decree settles the question of priority of payment between the annuity and legacy by declaring that the former must *be first paid*.

[The facts of this case are stated in the Chancellor's opinion.]

THE CHANCELLOR:

This case comes before the court upon exceptions to the report and accounts of the Auditor filed on the 30th of October last, and having been argued by the counsel of the parties, it becomes the duty of the court to decide upon the questions presented for its consideration.

In the will of the late Richard Moale, of Baltimore county, executed and proved in February, 1786, are the following provisions: “I will and direct, give and bequeath, unto my dear wife, Frances Halton Moale, £2250 specie, to be paid in English guineas, at 35 shillings each.” “I give and bequeath unto my dear wife, Frances Halton Moale, £500 in English guineas, at 35 shillings each, yearly, during her natural life, to be secured to her, my dear wife, Frances H. Moale, out of, and from the rents arising from my estate, but with this reserve, in tender care and affectionate regard to my dear wife, I will and direct

that she, my dear wife, Frances H. Moale, nor no person or persons for her, shall, by any means or ways whatever, sell, assign, or transfer, or by any means or ways, whatever, divest herself, or be divested of the said yearly sum of £500 aforesaid, or any part or parcel thereof." And then, after a provision that said sum of £500 should be paid to his wife, and to her alone, and a bequest to her of his carriage and horses, the will proceeds, "and I here declare, that this and the above legacies are given to my dear wife instead of her right of dower." And further, "I will and direct, that after my just debts are paid, and the legacies herein given and bequeathed to my dear wife, Frances Halton Moale, be first complied with." There is then a residuary clause, giving to John Moale, the brother of the testator, the rest and residue of his property, "after the above or foregoing will is complied with."

In a previous part of the will, the testator designated particular portions of his property, real and personal, which he directed to be sold for the purpose of defraying the expenses of his funeral, paying his debts and discharging the legacies thereinafter mentioned, and he constituted his said wife, his brother John Moale, and Jeremiah T. Chase joint executors and executrix of his will.

Afterwards, in the month of January, in the year 1788, Frances H. Moale, the widow of the testator, intermarried with one David Harris, but prior to the marriage, she, and the said Harris, conveyed to one John McLure, the aforesaid legacy and annuity, in trust, for her sole and separate use, and upon the footing of this conveyance, McLure, the trustee, in February, 1789, filed his bill in the Court of Chancery, against John Moale and Jeremiah T. Chase, the acting executors of the testator, Richard Moale, alleging that his whole real and personal estate, after the payment of debts, was chargeable with the legacy and annuity, and praying that a decree might pass for the sale of so much of the real estate as may be necessary after the application of the personal estate for the payment of the balance due on the legacy, with interest, and for the punctual payment, yearly, of the said annuity, to the said Frances during her life.

Upon this bill, after the answers had been filed thereto, and various proceedings had, the Chancellor, on the 13th of May, 1790, passed his decree, by which it was declared, that after the payment of the debts of the testator the annual rents of all the lands held by the testator (of which a schedule was annexed) and also all the annual rents of the lands leased or to be leased by the defendant, John Moale, should be chargeable in his hands, and in the hands of his heirs and assigns, *in the first place*, with the payment of the annual sum of £500, current money, from the 22d of February, 1786, the day of the death of the testator, and during the life of the said Frances H. Moale, to John McLure, the complainant, as her trustee, in trust for her, *and in the next place*, all the said annual rents, as they arise, shall be, and are hereby declared to be, chargeable in the hands of the said John Moale, as devisee and heir aforesaid, and in the hands of his heirs, &c., with the payment to the said John McLure and his heirs, in trust, for the said Frances H. Harris, if any arrearages of the said annual sum of £500 now accrued, or that may hereafter accrue, with interest on such arrearages as they become due, until the same, with interest, are paid. And in case the said arrearages shall not be paid during the life of the said Frances H. Harris, that in such case, the said arrearages with interest as aforesaid, shall be paid to the said John McLure and his heirs, in trust, for the use of the representatives of the said Frances after her death. And *after payment* of said arrearages and interest, the reversion in fee, devised to the said John Moale, shall be, and is thereby declared to be, chargeable in the hands of the said John Moale, and his heirs, &c., with the payment of the legacy in the said will, to the said Frances, the wife of the testator, of £2250, current money, with interest thereon from one year after the death of the testator, to the said John McLure, and his heirs, in trust, for the use of the representatives of the said Frances H. Harris, which said legacy, with interest as aforesaid, shall be first paid, &c.

It appears from the proceedings, that the £500 annuity was not regularly paid, but large arrears were permitted to accumu-

late, and that a considerable amount of the legacy of £2250 also remained unpaid. This seems to have been the condition of things when David Harris, the second husband of Francis H. Moale, died, in November, 1809, and having by his will appointed Joseph Sterrett and Molly Sterrett his executors, they, and the said Frances H., on the 23d of April, 1811, entered into an agreement for the purpose of settling the several points of disagreement between them.

This agreement recites, that the said Frances had renounced the will of her husband, the said David Harris, and elected to take her dower in his real, and her third of his personal estate. That she claimed in her own right that portion of the legacy of £2250, which remained unpaid, with interest, and the arrearages of the £500 annuity, with interest, and also the growing annuity. And that the executors of the said David, also claimed the same in virtue of his will. The agreement then provides that for the purpose of settling and adjusting the claims of the respective parties, and to avoid litigation, that the executors shall pay and deliver to the said Frances, certain sums of money and property bequeathed to her by the said David Harris; that the said Frances, her executor, &c., shall have and receive one-third of whatever might be thereafter received by the said executors, of the legacy of £2250, and one-third part of whatever might be recovered of the arrears of the said annuity of £500, which were due at the death of the said David Harris. In consideration thereof, the said Frances agreed to release to the said Joseph and Molly Sterrett, her dower in the real and personal estate of her said husband, David Harris, and also her right, title and claim to the said legacy of £2250, except such part thereof as is reserved to her by these presents, and also her right, title and claim to the said annuity of £500, and the arrears thereof, except only the part which is reserved to her by these presents. The agreement then provides that the claim for the balance of the said legacy, and for the arrears of the annuity due from the representatives of Richard Moale or John Moale, shall be under the exclusive control and management of the said Joseph and Molly Sterrett, who shall have

power to compromise and adjust the same as to them may seem advantageous, without the control or interference of the said Frances H. Harris, it being expressly understood, that she shall only be entitled to one clear third of whatever may be recovered by them of the said legacy or annuity, by suit or compromise, after deducting expenses, &c.

On the 22d of December, 1817, the Auditor, in conformity with an agreement of the parties, made a report to the Chancellor, ascertaining from the evidence then before him, the amount at that time due of the annuity for arrearages and interest, and also the amount of the legacy remaining unpaid, but this report was, by the Chancellor's order of March term, 1818, returned to the Auditor for a further report. Prior to this period, to wit, in June, 1809, a bill was filed by David Harris and Frances H. Harris, his wife, against John Moale and others, the purport and object of which, and of the bill of review by his and her executors, filed in 1815, and of an amended bill filed by them, is stated in an order passed by the Chancellor, on the 20th of September, 1820, in which the kind of decree to which he thought the complainants were at that time entitled, is pointed out. The Chancellor, in this order, expresses the opinion, that the residue of the estate of Richard Moale, devised to John Moale by Richard, gave the devisee no beneficial interest until the will was complied with, whether the rents arising from the estate remained at their first value or not, and that a decree for the payment of the annuity or arrearages of the legacy would not take any thing from the representatives of the said John to which they were entitled, and he affirms that such has been adjudged to be the effect of the will by the decree upon McLure's bill, passed in 1790. The Chancellor then, after describing the nature of the decree to which the complainants were at that time entitled, reserved for future consideration, the question of the propriety of selling the reversion, which had been somewhat pressed in the argument before him.

On the 23d of December, 1820, the Auditor, on the application of the administrator of Frances H. Harris, stated and re-

ported an account, showing the proportions of the annuity due him as such administrator, and the proportion due the executors of David Harris for arrearages down to the period of the death of the said Harris, and also the amount due the said administrator of the wife for the arrearages which accrued from the period of the death of David Harris, on the 22d of November, 1817, which report was, by the decree of the Chancellor of the 11th of January, 1821, ratified and confirmed. The amount of the arrearages, with interest thereon, which accrued in the interval between the deaths of David Harris and his wife Frances, is stated in this account to be \$3990 24.

Several other accounts were subsequently reported by the Auditor, all of which were based upon the account of the 23d of December, 1820, and all of these received the sanction of the court.

It may be proper to state, that by the agreement of the 23d of April, 1811, between the executors of David Harris and Frances H. Harris, it was stipulated, that the latter should have the ground rents, which had or might accrue on certain lots or parcels of ground leased by Richard and John Moale, from the death of the said David Harris to her own death, amounting to the annual sum of £449 8s. 6d., and that the difference between that sum and the annuity of £500, being £50 11s. 6d., should be paid to Frances H. Harris during her life, by the said executors of her husband David Harris, thus securing to her the whole of the annuity from the death of her husband so long as she should live.

Such was the condition of this case on the 13th of September, 1839, when a bill of revivor was filed by the proper representatives of Frances H. Harris, and of David Harris and others, against the proper parties, praying, among other things, that the reversion in the estate charged with the annuity and legacy might be sold; that the claims of the several complainants might be ascertained and established, and for general relief. And the Auditor having made reports ascertaining the sums due to the complainants, respectively, the Chancellor, on the 31st of January, 1845, ratified and confirmed the reports, and

passed a decree for a sale of the property, appointing a trustee for that purpose, with directions to sell the same, and to bring the proceeds into court for distribution under its direction.

This has been done, and the Auditor has reported two accounts, apportioning the proceeds of the sales between the representatives of Frances H. Harris, the wife, and David Harris, the husband.

In the account marked C., the proceeds of the sales are applied in proper proportions to the payment of the claims of these parties, on account of the arrears of the annuity, excluding altogether any claim founded upon the legacy of £2250 for the reason stated in the report.

In the other account marked D., the Auditor has included the legacy and treated it and the arrears of the annuity as constituting one claim, and standing on the same footing.

To both these accounts exceptions have been filed by the representatives of David Harris, and these exceptions and other questions connected with the final disposition of the case, have been argued by the counsel for the respective parties.

The Chancellor does not deem it at all proper or necessary to express any opinion with regard to the question whether, by the will of Richard Moale, the legacy of £2250 was with the annuity of £500 given to his wife, a charge upon the real estate of the testator in the lands of the residuary devisee, John Moale, or those claiming under him.

That question he considers to have been settled in the affirmative, by the decree of the 13th of May, 1790, by which the rents of all the lands are charged with the payment of the annuity due, and to become due, *in the first place, and after the said payment*, the reversion is declared to be chargeable with the payment of the legacy. The same view was taken by the court in 1820, when the order of the 20th of September of that year was passed, though for reasons, which are not very apparent, the court, at that time, forbore passing a decree for the sale of the property to pay the charges which it declared to exist. Neither does the Chancellor think it incumbent upon him to look into the grounds of the decree of January, 1845, under

which the property has been sold, unless such examination would reflect some light upon the only question now to be decided, which relates to the distribution of the proceeds of the sales, and he does not think that any such light can be borrowed from that decree, or that the late Chancellor, in passing it, meant in any way to contrast, or express an opinion upon the relative claims of the parties. He meant to decide, and he did decide, that the property was liable to be sold for the payment of these claims, but in what *order* they were to be paid, does not appear to have been considered by him.

Looking to the will of Richard Moale, there can be no doubt that he intended that his wife should, in any event, enjoy both the legacy and the annuity, the former within the usual period after his death, and the latter from year to year during her life, and that he supposed he had provided beyond contingency for the regular and punctual payment of both. There is nothing, therefore, in the will which very clearly indicates the order in which these claims should be paid, or rather which shall be preferred in case there should not be enough to pay both, and perhaps if confined to the will, the case would not, by any means, be free from difficulty.

The first proceeding in the case which relates to the order in which these claims are to be paid, or a preference given to one over the other, is the decree of the 17th of May, 1796, which declares in terms that the annual rents of all the property shall, *in the first place*, be charged with the payment of the annual sum of £500, and, *in the next place*, with the arrearages of said annuity, with the interest thereon, and *afterwards*, that the reversion shall be chargeable with the payment of the legacy of £2250, with the interest thereon.

This decree, therefore, having settled the question of priority between the annuity and the legacy, and having declared that the former must *be* FIRST *paid*, must decide the present controversy, unless there is something in the subsequent proceedings, or in the acts or agreements of the parties which can have the effect of modifying or controlling that decree.

David Harris having died on the 16th of November, 1809, his

executors, and Frances H. Harris, his widow, entered into the agreement of the 23d of April, 1811, the stipulations of which have been already adverted to. It is perfectly obvious, that this agreement did not propose to change the order in which the annuity and legacy were to be paid, or to disturb the priority of the former over the latter, as established by the decree of 1796. Its whole object, upon this subject, was to fix and adjust the proportions of these claims which the representatives of the husband, and the wife, should receive, which proportions were, that the wife should receive one-third of whatever might be recovered of the legacy, and one-third of whatever might be recovered of the arrears of the annuity which were due at the period of the death of David Harris, the residue of the legacy and of such arrears of the annuity being released to the executors of the said David Harris. This agreement then, though it fixes the proportions in which these claims shall be divided between the husband and wife, does not profess, in any way, to alter the order of payment, or to take from the annuity the preference and priority over the legacy which was given it by the decree of 1796. But the annuity of £500, did not stop with the death of David Harris, it was to continue until the death of Frances H. Harris, which took place in November, 1817, and the agreement of April, 1811, provides that she should have for her life the ground rents on certain lots and parcels of land leased by Richard and John Moale, amounting to a certain annual sum, the difference between which, and the annuity of £500, was to be paid to her by the executors of her husband David Harris.

The arrangement, then, between Mrs. Harris and the executors of her husband was this: That she was to receive one-third of the legacy of £2250, one-third of the annuity which accrued during the lifetime of her husband, and the whole of the annuity which might accrue after his death, the said executors being entitled to receive the remaining two-thirds of the legacy, and of the annuity which accrued during the life of the husband, but no part of the annuity which accrued subsequently to his death.

But the proceeds of the property now to be distributed, are

insufficient to pay the arrearages due upon the annuity, and consequently it follows, if these proceeds are to be applied to its payment in the first instance, nothing will be left applicable to the legacy.

This is the conclusion to which I have arrived, after a careful consideration of the voluminous proceedings in this case, and as the account C., filed on the 30th of October last, is stated according to my views of the case, as herein expressed, I shall ratify that account, in which, it seems to me, I shall be acting in accordance with what has been repeatedly done by those who have gone before me, a number of accounts having been so stated by the proper officer and ratified by my predecessors in office.

JOHN S. McKIM AND OTHERS

VS.

S. J. K. HANDY AND OTHERS.

MARCH TERM, 1848.

[CONSTRUCTION OF WILL—TRANSMISSION OF TRUST—APPOINTMENT OF TRUSTEES
—COUNSEL FEES—LEGACY TO FEMALE INFANTS, WHEN PAYABLE.]

A TESTATOR devised real and personal estate to certain trustees, "to them and the survivor of them, and the heirs, executors, and administrators of the survivor" in trust "that the said trustees or the survivor of them, or the person or persons who may succeed them in the trust," may from time to time change the investments of the stocks and the proceeds thereof "with any accumulations of the fund generally," to reinvest, &c. **HELD—**

That it was the intention of the testator that the real and personal estate should remain in the same hands, and the trust was not transmitted to the executor of the surviving trustee, but the whole trust became vacant upon his death.

The recommendations of parties with reference to numbers, amount of interest and reasons assigned, will always be attended to upon the question of selecting a trustee, though the court is not bound by such recommendations.

Where trustees are entitled to costs out of the fund, they will be taxed as between solicitor and client, and if a trustee finds it necessary to employ counsel as to the proper management of the estate, he will be allowed such reasonable fees as he may have paid, but counsel fees paid by the successful party, in a contest as to who shall administer the trust, will not be allowed out of the fund.

A testator devised certain property in trust, and directed the trustees to pay to each of his grandchildren born and to be born, the sum of one thousand dol-

lars, "if they live to attain lawful age." One of the female grandchildren died after attaining eighteen years of age, but before twenty-one. **HELD—** That this legacy vested upon her attaining eighteen years of age, the intention of the testator being that the legacy should be paid to her when she was of *lawful age* to receive it, which, by the laws of this state, is eighteen years in the case of a female infant.

In this state the legal minority of a female infant, so far as the capacity to *receive* from the guardian is concerned, ends at the age of eighteen, and she is then entitled to receive her property, but for many purposes her legal minority does not cease until she is twenty-one years of age.

[The facts of this case are sufficiently stated in the following opinion of the Chancellor.]

THE CHANCELLOR :

The late John McKim, Jr., by his will, executed in December, 1841, devised and bequeathed to his sons, David T. McKim and John S. McKim, certain ground rents and stocks in the city of Baltimore, upon certain trusts. The devise is to them and the survivor of them, and the heirs, executors and administrator of the survivor, in trust and special confidence for the purposes mentioned in the will, and after directing the manner in which the trust fund shall be disposed of, the will proceeds as follows : "And in further trust that the said trustees or the survivor of them, or the person or persons who may succeed them in the trust, shall and may from time to time, as occasion shall require, or their judgment dictate, and the interest of the parties concerned render necessary, change the present investment of stocks or any of them and the proceeds thereof, with any accumulation from the income or profits of the fund generally, to re-invest in a safe and secure manner, and such reinvestments again to change, alter and renew, as often as occasion or circumstances in their judgment may render necessary or proper," &c.

John S. McKim, one of the sons, renounced the trust, and David T. McKim, the other son, who accepted and discharged the duties of trustee during his lifetime is now dead, having died in the year 1847, and having by his will appointed his wife executrix, and George H. Williams executor thereof.

The present bill was filed by some of the parties interested, against others, for the purpose of procuring the decree of this
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court, appointing a new trustee to complete the trust. The bill assumed that the whole trust had become vacant by the death of the acting trustee, David McKim, and prayed that a new one should be appointed in his place, to whom the said ground rents should be conveyed and personal property be transferred, for the purpose of completing the trust left unexecuted by the deceased trustee.

In the progress of the cause, a difference sprung up among the parties in regard to the person who should be appointed trustee, and then it was maintained by some of them that Mr. Williams, stated to be the sole acting executor of the will of David McKim, was *virtute officii*, the trustee under the will of John McKim, Jr., so far as relates to that portion of the trust fund which consists of personal estate. This is the question which has been argued, and must be decided.

In the first place it may be observed that a separation of the real from the personal estate constituting the trust fund, would manifestly be in opposition to the will of the testator, and interfere very materially with the objects of the will. The direction is, that the trustees or the survivor, or the person or persons who may succeed them, may change the investments of the stocks and the proceeds thereof, with any accumulations from the income or profits of the *fund generally*. The whole is entrusted to the same keeping, and the same judgment which is to determine the propriety of selling and reinvesting the proceeds of the stocks is to decide upon the investment of the profits of the fund generally.

If, therefore, this court should decide that the trust, so far as the personal estate is concerned, has devolved upon Mr. Williams, as the executor of David McKim, by force of the words in the will of John McKim, Jr., "the heirs, executors, and administrators of the survivor," which it is said gives the power not only to the original trustee, but to the heirs, executors, and administrators of the survivor of them, then it would follow if the heirs of said David McKim were of age, that the trust as to the real estate devolved upon them, and thus it would happen that this property which the testator plainly designed should

remain in the same hands until all the purposes of the trust should be accomplished would be separated.

The case then would be precisely like the case of *Cole vs. Wade*, 16 *Ves.*, 45, in which the Master of the Rolls decided against the transmission of the trust to the executors of the surviving trustee, notwithstanding the testator in express terms had given the power not only to the original trustees, but to the heirs, executors, and administrators of the survivor of them. It may be said here as it was said there, that "the heirs and executors of the surviving trustee may be different persons, yet all the directions about the distribution, (the selling and reinvestment in this case,) proceed upon the supposition that the same persons are to select the objects and settle the proportions in which they are to take." But the Master of the Rolls proceeds to say, "if the real estate is to go to one, and the personal estate to another, it is entirely uncertain how the power is to be executed." So here if the real estate is to go to one, and the personal estate to another, how shall the power of reinvestment be executed.

It is contended in this case on the part of those of the *cestui que trusts* who desire the appointment of Mr. Williams, that the power given to the trustees by the will of the testator, does not imply a personal confidence, and that a power of this kind to trustees, their heirs, executors, and administrators is not confined to the original trustees, but passes to all who may sustain that character. But my decided opinion is, that the power here, does imply personal confidence, and that degree of confidence which a testator would not be very likely to repose in those whom he could not know, and of course he could not know the persons whom the trustees appointed by him would make their executors.

The judgment of the Master of the Rolls in the case of *Cole vs. Wade*, 16 *Ves.*, 27, which judgment was affirmed by the Lord Chancellor in 19 *Ves.*, 425, and against which no opposing authority has been produced, seems to me decisive of the question in this case. There being then no one to execute this trust, this court must appoint a trustee for the purpose.

Two persons are recommended, John S. McKim, one of the

trustees named by the testator, and George H. Williams, the executor of David T. McKim, the deceased trustee. A majority in amount of interest recommend the former, and when to this is added the consideration that he is the party selected by the testator himself for the execution of this responsible trust, I do not see how any other selection can be made by this court. No objection, so far as I am informed, exists to either of these gentlemen personally. On the contrary, they are both represented and believed to be every way worthy of the trust, and my preference of the one over the other does not imply the slightest want of confidence in the party not appointed. Mr. McKim is chosen because he is recommended by the parties having the largest interest in the trust fund, has himself a personal interest, and especially because the testator himself the author of the trust, selected him.

An order will be signed appointing John S. McKim, and clothing him with power to execute the trust upon his giving bond, with approved surety, in the penalty of fifty thousand dollars for the faithful performance of the trust.

[A decree was accordingly passed on the 12th of May, 1848, appointing John S. McKim trustee, in place of David T. McKim deceased. This trustee subsequently resigned the trust, when a controversy again arose as to his successor, which the Chancellor decided by the following opinion, delivered on the 20th of September, 1848.]

THE CHANCELLOR:

John S. McKim, the trustee appointed by the decree of this court to fill the vacancy occasioned by the death of David T. McKim, having resigned the trust, it has become necessary to appoint another to execute the powers and duties which by that decree were conferred upon him.

The parties interested have named two persons, Haslett McKim, of the city of Baltimore, being recommended by one portion of the *cestui que trusts*, and George H. Williams, of said city, by another. Two-thirds concur in the recommendation of the former, and one-third of the latter, and this numer-

ical weight in favor of Mr. McKim is sustained by at least an equal amount of interest.

It has been declared by this court upon several occasions that the recommendations of parties with reference to numbers, amount of interest, and reasons assigned, are always attended to upon the question of selecting a trustee, and the propriety of the observation is manifest, as in the absence of controlling circumstances to the contrary, there seems to be a peculiar fitness in consulting those whose interests are at stake. The court, it is true, is not bound by such recommendation, as it is clear beyond question, and it is conceded all round that in the selection of a person as trustee, the court exercises a sound discretion upon a survey of all the circumstances of the case.

There does not appear in this case any fact which should outweigh the influence which numbers and amount of interest ought to have in guiding the discretion of the court, unless it is found in the circumstance that as the recommendation of the majority was gratified in the appointment of John S. McKim, who has declined, the wishes of the minority are now entitled to be respected. It is supposed the late Chancellor was governed by some such consideration as this in the case of *Williamson vs. Swann*, but as it does not appear upon the face of the orders that he acted upon this reason, and as I do not very clearly see why this alternation should be observed, I rather incline to think the Chancellor proceeded upon some other ground. At all events, if, as is not denied, the court should attend and give weight to the recommendation of the majority of those having an interest in the trust fund, the reason is very far from being obvious why this recommendation should be disregarded in the selection of a second, when the first person chosen refuses or declines to act, and I am, therefore, not prepared to adopt such a rule.

Considering that a majority of the persons concerned recommend Haslett McKim, and in view of the character of the trust, and all the surrounding circumstances of the case, I consider it proper to appoint him the trustee, and shall pass an order to that effect.

[On the 13th of October, 1848, John S. McKim and others filed a petition in which they state the filing of their petition for the appointment of a trustee to succeed David T. McKim, and the subsequent proceedings thereon, and that for professional services rendered by their solicitors therein, they had agreed to pay them \$200. They then allege that this compensation should be paid out of the trust fund, and pray that the present trustee may be directed to pay the same. Upon this petition the Chancellor delivered the following opinion on the 27th of October, 1848.]

THE CHANCELLOR :

Upon the first presentation of the petition of John S. McKim and others, filed on the 13th instant, my impression was in favor of the application, but upon subsequent reflection, I am persuaded it would be establishing a new and, I cannot help thinking, a dangerous precedent. If in contests like the present it is understood that parties are to be allowed out of the fund their whole expenses, it occurs to me it would have a tendency to encourage litigation, and it would be difficult to restrain within reasonable bounds the extent to which the practice might be carried. Should this court declare that in contests here in regard to the appointment of a trustee in a case like the present to take charge of the trust estate, the party who is successful, or all the parties are to be paid out of the fund, their costs not only as between party and party, but as between solicitor and client, it would seem to follow that the same principle of taxation should be adopted in the Orphans Court when disputes arise there in reference to the right of administration upon the estates of deceased persons. Why should this court say that when controversies spring up here as to the right to administer a trust, the ordinary rule as to the taxation of costs shall be departed from, and the estate burdened with all the expenses, ordinary and extraordinary, and the Orphans Court, when similar controversies arise there, act upon a different rule? It is very far from the meaning of the court to impute to these parties an intention now or at any other period to indulge in a

spirit of litigation at the expense of the trust estate, but it is obvious that an order directing counsel fees to be paid out of it would in many cases produce such a result.

It is believed, that no precedent can be found for the present application. The rule is, no doubt, a general one, that when personal representatives, and other trustees, are entitled to costs out of the fund, the costs will be taxed as between solicitor and client, and it is said in the books, that when a trustee finds it necessary to employ or advise with counsel, as to the proper management of the trust estate, he will, when his accounts come to be taken, be allowed under the head of just allowances, such reasonable fees as he may have paid. *Fearn's vs. Young*, 10 *Ves.*, 184; 3 *Daniell's Ch. Pr.*, 1586. The rule with regard to taxation of the costs of the heir at law, who is brought before the court in the case of a charity, can have no application. It seems to be settled, that in such a case, if he makes no improper point, he will be allowed his costs as between solicitor and client. *Currie vs. Pye*, 17 *Ves.*, 462. And the practice in England, upon creditor's bills, of making this favorable taxation for the benefit of the suing creditor, when the estate has proved insufficient, seems equally inapplicable, even if such practice obtained here, which, however, is not understood to be the case.

Considering this application, then, unsupported by precedent, and believing the granting it would have an injurious tendency, I shall dismiss the petition, but without cost, as it was a point which, under the circumstances, was proper to bring to the notice of the court.

[A further opinion was delivered in this case on the 5th of January, 1849, upon the petition of John M. Duncan. The facts are stated in the opinion.]

THE CHANCELLOR :

The question now presented arises upon the petition of John M. Duncan, administrator of Ann S. Duncan.

The deceased was one of the grandchildren of the late John

McKim, Jr., and having died after attaining the age of eighteen years, but before twenty-one, and unmarried, the question presented is, whether she is entitled to the benefit of a provision in the will of her grandfather, who died in the year 1842. The will places certain property in the hands of trustees, in trust, that the same be held by them, "and the income and profits to receive and take as a fund out of which they shall, as soon as practicable, pay to each one of his grandchildren living and of age at his decease, and to those who are minors, and to those who may hereafter be born, and live to attain *lawful age*, the sum of one thousand dollars each."

It is insisted by certain of the parties having an interest in the question, that the terms "*lawful age*," as used in this will, mean the full age of twenty-one years, and as the bequest was contingent upon the legatee attaining that age, it never vested, but sunk in the residuum for the benefit of those entitled thereto.

That the minority of females, as well as males, continues until twenty-one, at common law, is too clear for dispute, and I do not understand that there is any thing in our legislation which abridges the period to every intent and purpose, though we have several acts of Assembly which confer capacities upon females under twenty-one, which they would otherwise be incompetent to exert.

Thus, the act of 1798, *ch. 101, sub. ch. 12, sections 1 and 15*, limits the period to which guardians may be appointed by the Orphans Court to a female infant, to the age of sixteen years or marriage, when the guardianship ceases, and the ward or husband, as the case may be, is entitled to receive from the guardian her property.

The act of 1829, *ch. 216, sec. 5*, declares that the guardianship of females shall continue to the age of eighteen or marriage, and the 6th and 7th sections of the same act, require the guardian upon her attaining that age to deliver her property to her, and gives to her receipt or release, executed before the Orphans Court, the same effect precisely as if she were of the full age of twenty-one years.

There can be no doubt, therefore, that a female, at the age of eighteen years, is entitled to receive her property of her guardian, and may release and acquit him in respect thereof. But, still, it is said, her legal minority does not cease until she is twenty-one years of age, and it is very clear, I think, that for many purposes, it does not.

We are here, however, construing a will, and the question is, what did the testator intend by the term "lawful age?" Did he not mean that age at which his female grandchildren would be entitled by law to receive their estates from their guardian? My opinion is, he did so mean, and if he did, of course his intention must prevail, although for many purposes the legal minority of the legatee does not terminate until she attains the full age of twenty-one years.

The language of the will is, that the trustees shall, out of the funds provided for the purpose, pay to each of the grandchildren, born and to be born, the sum of one thousand dollars, if they live "to attain lawful age." Lawful age for what? Why lawful age to receive. That age at which, according to our legislative enactments, they are entitled to demand and receive from their guardians all their property and to give valid releases therefor. The testator must be presumed to have known the law, and that at the age of eighteen a female ward became entitled to her property from her guardian, though she remained subject to all the disabilities incident to a condition of legal minority, but those which the acts of Assembly removed. It is to be presumed the testator intended the trustees should "pay" when the legatee became entitled by law to receive, and that by express legislation is in the case of a female when she attains the age of eighteen.

The cases referred to, if any confirmation could be required, of language so explicit as the legislature has employed, conclusively show, that the legal minority of a female, so far as the capacity to receive from her guardian is concerned, ends at the age of eighteen, and that she is at that age entitled to receive her property. *Davis vs. Jacquin & Pomerait*, 5 H. & J., 100; *Bower's adm'x vs. State, use of Dryden*, 7 H. & J., 32; *Fridge vs. State, use of Kirk*, 3 G. & J., 104.

The trustees under the will of Mr. McKim may, I think, with propriety, be regarded as testamentary guardians, or as guardians appointed by the Orphans Court, and the testator is to be presumed to have intended that they should pay to his legatees, at the period when such guardians would, by the statute, have been required to settle with and pay to their wards. My conviction is very strong, that if the testator had been asked, at what age he intended his granddaughters should be entitled to the money in question, he would have said, at the age when by law they would be entitled to the possession of their property.

An order will be passed in conformity with these views.

JAMES HIGGINS AND JOSHUA HIGGINS, }

vs. }

DECEMBER TERM, 1847.

RICHARD W. HIGGINS AND OTHERS. }

[PRACTICE IN CHANCERY—TRUSTS.]

A TESTATRIX by her will executed in 1812, bequeathed her property, real and personal, in trust, for the use of her granddaughter during her natural life, and after her death the same with its increase, to be divided generally among her children. The trustee named in the will declining to act, the Chancellor appointed trustees in 1815, who in 1827 were discharged, and two of the *cestui que trusts* were appointed trustees in their place, and in the same year a decree was passed for a sale of some of the negroes belonging to the estate, and the trustees gave bond for the execution of the trust. The granddaughter died 1846, and in the same year two of the *cestui que trusts* filed their bill for a settlement of the estate and distribution of the fund. HELD—

That in the distribution of the fund, under *this bill*, the accounts of the trustee, who sold some of the negroes under the decree of 1827, and appropriated the proceeds to his own use, could be inquired into and settled, and the amount so appropriated by him, with interest, deducted from his share of the fund.

There is but one trust in this case, though it has been cut up into several distinct proceedings, and now, when a final disposition of the whole fund is about to be made, it is indispensable to justice that all the proceedings should be brought together by an order of consolidation.

The trustee, acting under the decree of the Court of Chancery of 1827, is entitled to a commission of *seven and one half per cent.* on the income of the real and personal estate.

[The facts of this case are fully stated in the Chancellor's opinion.]

THE CHANCELLOR :

The merits of this controversy, as I understand them, are decidedly with the plaintiffs, and, therefore, unless some insuperable difficulty shall be found in the legal and technical objections urged by the solicitor for the defendants, an order or decree must be passed in accordance with the prayer of the bill.

It appears by the proceedings, that a Mrs. Ann Maccauley, in November, 1812, executed her last will and testament, by which she gave and bequeathed all her property, of every description, to her friend Gideon White, in trust, for the use of her granddaughter, Ann Higgins, the wife of George W. Higgins, during her natural life, and after her death, all the said property, and its increase, to be equally divided among the children her said granddaughter should leave at the time of her death, share and share alike. And the testatrix further declared it to be her will, that in case her said granddaughter should survive her husband, that then the trust created by the will should cease and determine, and the whole of the property of which the testatrix died possessed, and the increase thereof, should be vested in, and be the sole right, property and estate of her said granddaughter, her executors, administrators and assigns.

The testatrix died in the following year, when the will was duly admitted to probate, and the trustee, White, having refused to assume the trust, and having also renounced the executorship of the will, the Chancellor, on the 16th of May, 1815, upon the petition of Higgins and his wife, passed an order directing that White should assign the trust to Thomas H. Dorsey and Thomas W. Hall, and vesting in them authority to act as trustees under the will, in the same manner as if they had been appointed by the testatrix.

After some further proceedings upon this petition, which it does not appear to me to be necessary to notice particularly,

the trustees, Dorsey and Hall, on the 8th of April, 1827, filed their petition in that case asking to have their accounts audited, and that they might be relieved from any further execution of the trust, and on the 11th of September following, an order was passed referring the case to the Auditor, to state the necessary accounts.

The Auditor, on the 14th of September, 1827, reported an account, showing a balance due the trustees of \$280 95, which was ratified by the Chancellor on the 8th of October following. And on the same day, upon the petition of Higgins and wife, the defendant, Richard W. Higgins, and the complainant, Joshua Higgins, were, by an order of the Chancellor, appointed trustees, to complete the trusts of the will of Ann Maccauley, in the place of the said Dorsey and Hall.

On the 15th of October, 1827, a bill was filed in this court, by Higgins and wife, Richard W. Higgins, Joshua Higgins and Dorsey and Hall, against James Higgins, an infant son of the said Higgins and wife, in which the proceedings in the other case are referred to, and praying upon the allegation, that the negroes had so much increased in number as to be burdensome to the estate, that a portion of them, of which a list was annexed to the bill, and numbering 23, might be sold, and the proceeds applied to the payment of the balance due Dorsey and Hall, and the residue to the use of the other complainants. The Chancellor passed a decree upon this bill, on the 6th of December following, for a sale of the property, and appointing the said Richard W. Higgins and Joshua Higgins trustees, to sell, who on the 27th of February, 1828, executed a joint bond for the faithful performance of the trust.

Richard W. Higgins, one of the trustees, reported the sale of one of the negroes, on the 8th of May, 1834, and on the 10th of April, 1835, he reported the sale of two others, both of which sales were duly ratified; since which period there does not appear to have been any further proceeding in that case.

The bill in the present case, was filed on the 27th of June, 1846, by James Higgins and Joshua Higgins, two of the children of Ann Higgins, who died early in that year, (her husband

surviving her,) against Richard W. Higgins, her remaining child, and his insolvent trustee, in which the proceedings in the first of the other two cases are referred to, and the aid of the court is asked in settling up the estate by sale or division thereof, among the parties entitled, and upon the allegation that Richard W. Higgins had, by selling and appropriating the money to his own individual use, received a much larger share of the trust estate than he would, upon a fair distribution thereof, be entitled to; the complainants pray that neither he nor his insolvent trustee, he having petitioned for the benefit of the insolvent laws in the year 1840, should be allowed to participate therein.

The bill was answered by the defendant, Higgins, and his permanent trustee, David Stewart. The answer of the latter puts the complainants to the proof of the case, and pleads the statute of limitations, against any claim against Richard W. Higgins founded upon the alleged conversion by him of the personal property to his own use.

The answer of Higgins, admits most of the material averments of the bill. And in his testimony, which was taken under a commission, and order for his examination, subject to exceptions, and which, I think competent, though objected to, he proved, that while acting as trustee and manager he sold a number of the negroes, whose names and prices are stated, and that the proceeds of sale so made by him, as of the crops made upon the trust property, which consisted in part of real estate, he appropriated to his own use one-half, and the other half to the support of the estate, and of the family, of whom his brothers Joshua and James were members. He further stated, that Joshua always objected to the sales made by him of the negroes. And in a deposition made by the same witness, which it was agreed should avail as if taken under the commission, he proved that he had received the sum of about \$700, as hire of a portion of the trust negroes, of which he had appropriated at least four-fifths to his own use.

Under an agreement for the purpose, the two cases founded

upon the will of Ann Maccauley were introduced as evidence in this cause.

Upon this state of facts, the question is presented, and has been argued, whether in case of a sale or division of the remaining trust property, the insolvent trustee of Richard W. Higgins can be admitted to a participation until he shall have first accounted for that portion thereof which it is apparent, from his own testimony, he has received and applied to his own individual benefit?

In the event which has happened, the death of Mrs. Ann Higgins in the lifetime of her husband, her children, the two complainants, and Higgins, one of the defendants, were to receive share and share alike the property bequeathed by Mrs. Maccauley and its increase, such being the express language of the will, and it is therefore perfectly obvious that if the defendant, Higgins, should be allowed to retain that which he has already appropriated to his own use, and to receive his share of what remains equally with the other children, he will have enjoyed a larger portion of the proceeds than he is fairly entitled to, and the provisions of the will must be disregarded and frustrated.

Against a consequence so unjust, the principles settled by the orders of the late Chancellor, in the case of *Harwood's estate*, are in decided opposition, and without some controlling authority overruling them, I could not bring my mind to a different conclusion. Here is a trust fund under the control of the court, which it is asked to distribute among the parties entitled, and it appears by the evidence of one of them, who was constituted also trustee for the others, under the authority of this court, that whilst acting in that capacity he received and applied to his own use a large part of the trust fund, and in the face of that confession on his part, it is proposed that he shall be allowed to come in equally with the other *cestui que trusts* in the division of what remains, without accounting for that which he has already received.

It is said, however, that before any notice can be taken of the proceedings of the defendant, Richard W. Higgins, under

the decree of December, 1827, by which he and Joshua Higgins were appointed trustees, to sell certain of the slaves that the accounts in that case should be settled, and that even if settled, these complainants must seek their remedy upon his bond, and cannot under the bill in this case have any relief in respect of those accounts.

It must be remembered, however, that by the agreement of parties, the proceedings in relation to the trust under the will of Mrs. Maccauley, and upon the bill filed on the 15th of October, 1827, are introduced and made evidence, and although the bill filed in this case does not refer in terms to the trust created by the bill of October, 1827, yet looking to the whole scope and object of the present application to this court, it seems sufficiently obvious that the defendant, Higgins, was called upon to account for the whole trust connected with this property. And the proceedings in all the cases being before the court by agreement, I do not think there is any rule of chancery pleading which will debar the complainants from the right now in this case to have those accounts examined and adjusted.

It is, moreover, by no means clear, that all the sales were made by the defendant, Higgins, under that decree. He reported the sale of but three slaves, and in his testimony he speaks of the sales as having been made by him when acting as trustee and manager, and speaks of the proceeds of such sales, and of the crop made on the land, constituting a part of the trust estate in the same way, and as having been indiscriminately appropriated to his own use. There is, therefore, great difficulty in determining whether in making the sales other than those which he reported to the court, the trustee, R. W. Higgins, was acting under the order of the 8th of October, 1827, which substituted him and Joshua Higgins as trustees, to complete the trust created by the will of Mrs. Maccauley, or under the decree of the 6th of December of the same year, by which they were authorized to sell the negroes therein mentioned.

But conceding for the sake of the argument that the sales were all made under the latter decree, and that the accounts of

the trustees appointed by it must be settled independently, and cannot be made the subject of investigation in this case, the court cannot see how the ultimate rights of the parties would be affected by it. If the proceeds of the property now about to be divided, or sold for the purpose of division, were ready for distribution, the court, upon a proper application, suggesting the misapplication by Richard W. Higgins of the trust fund which came to his hands under the decree of December, 1827, *would detain* his proportion of the property in this case, to meet anything which he might appear to be indebted to the parties in the other case, when his accounts should be settled. For, entertaining the opinion that it is the duty of this court so long as the fund is under its control, to see that these *cestui que trusts* receive equal portions of the bounty of Mrs. Maccauley, it would not suffer any one of them to withdraw from its custody any portion of it when well grounded suggestions are made that such party has already received more than his share.

According to my view of this case, there is but one trust, although it has been cut up into several distinct proceedings, and parceled out among several hands. Now, when a final disposition of the whole trust fund is about to be made, it is indispensable to justice that the proceedings in all the cases should be brought together, which may be done by an order of consolidation which will be passed.

The next question discussed by the counsel relates to the liability of the defendant, Richard W. Higgins, to be charged with interest upon the proceeds of sales for which he has not accounted, and I think there can be no doubt that he is so liable. In the contingency which has happened, the increase as well as the original stock was to be equally divided among the three children of Mrs. Higgins, and if any one of them has appropriated an undue share of the principle to his use, I am at a loss to see upon what principle he shall be exempt from the payment of interest. Suppose, instead of wrongfully using this money, he had with the consent of the court borrowed it from the trust fund? Would he not in such case be chargeable

with interest, and if he would, shall he not be equally chargeable when he has used it without any such authority? It is no answer to say that Mrs. Higgins was entitled to the use of this property during her life, because the interest on the money expended by the defendant, Higgins, is a part of the use of which she did not receive the benefit, and it must go over with the other increase according to the will.

The question whether Joshua Higgins is so far implicated in the misconduct of the defendant, Richard, as to make him responsible to his co-complainant, James, is a question to be settled between them, but cannot in any way affect the liability of the defendant, Richard.

The Chancellor does not think the plea of limitations can avail the defendant. Mrs. Higgins, during whose life these plaintiffs had no title, did not die until a very short time before this bill was filed. If she had survived her husband, the trust would have ceased, and the property have become her's absolutely. Their right, therefore, was wholly contingent until her death, and, consequently, as it seems to me, limitations could not run against them.

But this is not a case in which these parties are proceeding to enforce actively their claim under the decree of December, 1827. They insist that under the sales made in that case or in the other, in both of which this defendant acted as trustee, he received more than his proportion of the trust fund, and they pray that in consequence of such receipts by him he shall not be permitted to participate in the residue. The principle settled in the case of the *Farmers Bank and Iglehart*, decided at December term, 1846, is considered applicable to this, and as affirming the right of the court to withhold from the defendant, Higgins, his proportion of the fund now to be distributed.

It appears by the testimony of the defendant, Higgins, that he acted as manager of this estate for many years, receiving and appropriating the proceeds of the crops partly to his own use, and partly to the use of the other parties, and I think that in conformity with the decision of the Court of Appeals in the case of *Hatton vs. Weems*, 12 *Gill & Johns.*, 83, he is entitled

to commissions on the income of the real and personal estate. The allowance as in that case will be seven and one-half per cent. on the income of each.

An order then will be signed consolidating the three cases, and the referring the case as consolidated to the Auditor for the purpose of taking an account to ascertain the amount of the trust fund with which the defendant, Richard W. Higgins, is chargeable according to the principles stated in this opinion. This to be taken from the pleadings and proofs now in the cause, and such additional proofs as the parties may lay before him, for which a reasonable time will be allowed. And if it is desired, the order may also provide for the sale of the remaining trust fund, but no distribution of it in kind can be made until the accounts are stated.

McLEAN and ALEXANDER, for Complainants.

R. W. GILL, for Defendants.

ANTHONY SMITH ET AL

vs.

JOHN CHANEY.

} DECEMBER TERM, 1847.

[DEFICIENCY IN LAND SOLD.]

A PURCHASE of land*containing 181 acres, more or less, at so much per acre, was made in 1841, and at the same time the vendor agreed in writing to make deduction out of the purchase money for so much of the land sold, "where peaceable possession could not be given." The vendor, subsequently executed a deed to the vendee for the land, describing it by metes and bounds, course and distance, and as containing 181 acres, more or less, and put the latter in possession of the whole. This deed contained no covenants. **HELD—** That the stipulation on the part of the vendor was fully discharged by putting the vendee in possession of the land, and the latter could not claim an abatement of the purchase money for a part of this land, of which he, *subsequently*, permitted himself to be dispossessed.

The deed being subsequent in date to the contract for an allowance in case of deficiency must be considered as taking the place of all previous agreements on the subject, and as containing the full and entire contract of the parties.

A vendor selling in good faith is not responsible for the goodness of his title beyond the extent of the covenants in his deed.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This case is brought before the court upon a motion to dissolve the injunction, and the solicitors of the parties have filed written arguments in support of, and in opposition to, the motion.

The bill was filed on the 1st of December, in the year 1845, and alleges, in substance, that on or about the 1st of January, 1841, the complainants purchased of the defendants, Chaney and wife, a parcel of land of which they alleged themselves to be in possession, containing 181 acres and $\frac{7}{8}$ of an acre, at the price of \$45 per acre, the purchase money amounting to \$8,184 37, for which they gave their joint single bills to Chaney, who delivered to the complainant, Anthony, all the land except eight and seven-eighths of an acre, and agreed, in writing, to deduct from the purchase money the amount of said deficiency, (the agreement being filed as an exhibit with the bill,) and that the defendant and his wife executed to the complainant, Anthony, a deed for the land, which deed is also exhibited.

That the whole purchase money has been paid, except the last single bill for \$3,407 87 $\frac{1}{2}$, and upon that several payments have been made, amounting to \$1,500, of which the sum of \$400 was paid on the 29th of April, 1844. That in May, 1845, a judgment was obtained on this single bill against the complainants, without giving credit for the last payment of \$400, or the deficiency in the number of acres, in pursuance of the agreement, and the complainants are informed, and believe, that the defendant, Chaney, is about to enforce, by execution, the payment of the whole amount of the judgment, though they insist he never was in possession of the said eight and seven-eighths of an acre, nor had title thereto, the same being held and claimed by other persons.

Exhibits were filed with the bill, showing payments for which credits were claimed, all of which were credited upon

the judgment, except that for \$400 on the 29th of April, 1844, and for the alleged deficiency in the number of acres.

The agreement referred to in the bill bound the defendant, Chaney, to pay to Smith, "such sum or sums of money that might arise out of land sold him, where peaceable possession could not be given, the said, with interest, to be deducted from his bond of \$3,407 87, bearing date the 1st of January, 1841."

The deed from Chaney and his wife, which was executed on the 7th of May, 1841, conveyed to the complainant, Smith, for the consideration mentioned, being \$8,184 37, the parcel of land spoken of in the bill describing it by metes and bounds, course and distance, and as containing 181 and $\frac{7}{8}$ acres, more or less. The deed conveys the land in fee, but contains no covenants of any description.

Upon this bill and the exhibits, the late Chancellor ordered an injunction.

The answer avers that all the land sold was the property of the defendant at the time of the sale, and in his possession, and that no other person had any title to any part thereof, or had made any claim thereto, or had possession thereof. The answer also speaks of an agreement to have the land surveyed, and a survey in pursuance of such agreement, in the winter or spring of 1841, when it was found to contain the number of acres mentioned in the deed filed with the bill. That the complainants were shown the lines of the land, and it was well understood that the land was sold according to those lines by which it was described in the deed, and in conformity with which the defendant had held, and the complainant then held, possession, and if he is not now in possession of all the land it is because he has allowed others to encroach upon his just title and the possession he received from the defendant. The institution of the suit at law and the recovery of the judgment are admitted, as is also the right of the complainants to the credit endorsed upon the judgment, and also to be credited with the sum of \$400 paid on the 29th of April, 1844. Their right, however, to any credit on account of deficiency in the number of acres is disputed, and that is the only question now to be decided.

Upon carefully comparing the bill with the answer, I am of opinion the equity is sworn away and the injunction must be dissolved, except as to the \$ 400, to be credited as of the 29th of April, 1844.

It must be assumed that the land sold is correctly described in the deed, and the answer expressly states that the defendant had held, and the complainant then (at the date of its execution) held possession according to that description, and that if he does not now so hold, it is because he has subsequently suffered other persons to encroach upon his just title, and the possession he received from the defendant.

The agreement filed with the bill stipulated for an abatement in the purchase money, in case peaceable possession could not be given of all the land sold, but there was no agreement for an abatement of the purchase money if the purchaser, after being put in quiet possession, permitted others to interfere with such possession.

The stipulation on the part of the vendor would be performed by putting the vendee in peaceable possession of the property, and this he expressly says he did do, but he was under no obligation, as I apprehend, not only to place him in possession, but to defend and maintain that possession thereafter. After being fairly placed in peaceable possession of the property, it was the business of the purchaser, and not of the vendor, to vindicate his right thereto.

Some stress is laid by the counsel of the complainant upon the circumstance that the defendant suffered the bill to remain unanswered from December, 1845, to October, 1847, which is regarded as amounting to something like an admission of the merits of the complainant's case. But the defendant, it must be remembered, is a non-resident, living in a distant state, which certainly furnishes some apology for the delay on his part, and it may be that he did not choose to answer the bill until he could come to Maryland for the purpose. His affidavit to the answer shows him to have been in this state at that time.

But if delay in the assertion of one's rights is to be availed

of as an argument against their existence, it seems to me that the weapon may be used with more efficacy against the complainants than in their favor.

The bill alleges that they bought this land in January, 1841, and that the possession of the whole was delivered, except the 8 and $\frac{7}{8}$ acres, of which, of course, according to the allegation of the bill, possession never was delivered, and yet it is not until December, 1845, that they exhibited their bill to be relieved in respect of the alleged deficiency. Nor is this all. The entire amount for which the first single bill was given was paid, and payments made on account of the other of the obligations given for the purchase money of this land, the last payment being as late as April, 1844, without, so far as this record informs us, any intimation or complaint that the number of acres was deficient. Now it seems to me the complainants, without waiting for the judgment at law against them, ought, at an earlier date, and within a reasonable time after discovering the alleged deficiency in the number of acres, to have insisted upon a credit in respect thereof, and that there is in this delay of nearly five years, far more appearance of acquiescence on their part than can be inferred against a non-resident defendant for omitting to answer a bill for less than two years.

There is, moreover, another reason of great force, in my judgment, against allowing a credit for this alleged deficiency in the number of acres.

The deed, as we have seen, which was executed on the 7th of May, 1841, describes the land by course and distance, and as containing the number of acres spoken of in the bill. It is dated subsequently to the date of the contract of purchase, and of the agreement for an allowance in case of deficiency in the quantity of acres. This deed must be understood as taking the place of all previous agreements upon the subject, and as containing the full and entire contract of the parties, and yet we do not find in it any covenant in regard to the title of the vendor. It seems to me that if the purchaser had designed to guard himself against an apprehended deficiency in the number of acres, or any other defect in the title, to the whole or any

part of the land, he should have taken care to have had proper covenants inserted in the deed; the rule being that a vendor selling in good faith is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Gouverneur vs. Elmendorf*, 5 Johns. Ch. Rep., 79.

For these reasons, I am of opinion that the injunction must be dissolved, except as to the sum of \$ 400, which the answer admits to be a proper credit.

A. RANDALL, for Complainants.

W. H. TUCK, for Defendant.

BENJAMIN CARR	}	MARCH TERM, 1852.
vs.		
JOHN F. IRELAND ET AL.		

[CONSTRUCTION OF WILL—CONVERSION OF REALTY INTO PERSONALTY.]

A TESTATOR devised all his estate "both real and personal" to his wife for life, and after her death directed his executor to "sell his real estate and pay to each of his three grandchildren" \$1,000 each, when they arrive at the age of twenty-one. HELD—That this direction in view of a court of equity, operated a conversion of the real estate out and out into money.

[The late John Ireland by his will, executed on the 30th of May, 1848, devised to his wife all his estate, both real and personal, for and during her life, and after her death as follows: "My personal estate to be equally divided between my grandchildren," (naming them,) "to them and their heirs forever," "and that my executor sell my real estate and pay unto each of my three grandchildren," (naming them,) "the sum of one thousand dollars to each when they arrive at the age of twenty-one years, the interest to be paid annually. It is my will and desire, in case of either of my three grandchildren above named should die before they arrive at the age of twenty-one years, that the bequest herein made to such grandchild or children as may die shall be and remain the inheritance of his three other

grandchildren," (naming them,) "to them and their heirs forever."

After the death of the widow, the executor sold the real estate of the testator, under the directions of the will, and then filed his bill in chancery, asking the aid of the court as to the distribution of the proceeds, stating that they far exceed the legacies charged upon the land, and that he is in doubt whether the said proceeds are to be distributed as real or personal estate. He also states his proceedings in the Orphans Court as executor, and asks leave to account in this court in order to save himself from risk and loss. A decree for an account was passed accordingly.

The Auditor stated an account in which he assumed that the real estate of the deceased was converted by his will only to the extent of the legacies charged upon the money to arise from its sale, and the portion thereof of one of the grandchildren who died intestate after the death of the testator, but before the decease of the widow, was assigned equally to his brothers of the whole and half blood as the proceeds of an estate vested in him by descent on the part of his father. The Auditor also in his account deducted the sum of \$29 25 from the allowance made to the executor by the Orphans Court as commissions at seven and one-half per cent. on \$390, being the difference in value between the appraisement and reappraisement of negroes belonging to the estate.

Exceptions were filed to this account, so far as it regards the proceeds of the real estate directed to be sold as realty, and also to that portion of it which makes a deduction from the commissions allowed by the Orphans Court to the executor. The last exception was based upon the ground, first, that such allowance being made by the Orphans Court, a court of exclusive jurisdiction on that subject, the same cannot be revised by this court: and second, that it was a proper allowance being on the increased value of the property in the hands of complainant, and is similar to such allowance on increase of sales over appraisements. Upon these two questions, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

Upon consideration of the questions presented by the report of the Auditor and the exceptions of the parties, I am of opinion first, that the direction in the will of John Ireland that his executor should sell his real estate, operated a conversion of it out and out into money upon the death of his widow, in the view of this court, and consequently that the Auditor was in error in assuming that the conversion was only to the extent of the legacies to the three grandchildren. The general rule that land articted or devised to be sold and turned into money shall in a court of equity be reputed as money is, I think, applicable here. 2 *Story's Eq.*, sec. 790; *Ashley vs. Palmer*, 1 *Meribole*, 296.

Second. I am also of opinion, that the exception of the complainant is well taken, and that the Auditor erred in deducting the \$29 25 from the commissions allowed the complainant by the Orphans Court.

A. RANDALL, for Exceptants.

THE OHIO LIFE INS. AND TRUST CO. }

VS. }

WINN AND ROSS AND OTHERS. }

DECEMBER TERM, 1849.

[ANTE-DATING OF NOTES—SUBSTITUTION—LIMITATIONS—CHANCERY PRACTICE—
COUNSEL FEES—APPEAL.]

THE antedating of notes is not, *per se*, fraudulent or evidence of a dishonest intent, but where parties with a security before them covering a particular description of notes, make notes which upon their face are not within its terms, they cannot show by parol that such notes were antedated in order to bring them within the security.

Where a mortgage was executed to secure the payment of certain promissory notes, to be made by the mortgagors and endorsed by the mortgagees, and such notes were taken in exchange for those drawn by other persons.

HELD—

That the holders of the notes so given in exchange are entitled to be substituted to all the rights of the makers thereof, to participate in the proceeds of the sale of the mortgaged premises.

Where cross paper is given for mutual accommodation, each party is liable to

pay his own, and the holder of cross paper may prove, under a commission, by taking up his own note or exonerating the estate of the bankrupt.

Counsel fees are allowed to trustees, but a party who occupies simply the character of stakeholder will not be allowed such fees out of the funds in his hands.

It is an established rule of the Chancery Court that the statute of limitations runs against a claim or debt down to the time it is exhibited.

Where a promissory note is secured by a mortgage, the mortgagee having the legal title, is not ousted by his note's being barred by limitations, because the debt only is barred and the party holding the title may retain his legal advantage.

Parties who are entitled to be substituted in the place of such mortgagees, are entitled to the same exception from the operation of the statute with respect to proceeds of the mortgaged property.

The principle of substitution places the substitute in *all respects* in the place of the party for whom he is substituted.

Where a fund is in court for distribution among creditors, the practice of the court is to allow creditors to come in at any time before a distribution has been actually made.

So long as the fund is under the control of the court, it will let a creditor in who has been guilty of no negligence, and if necessary send the case to the Auditor to have a new account stated at his expense, notwithstanding notice to creditors has been duly given.

But where a creditor has been notified and a reasonable time allowed him to support his claim by proof, and he fails to do so, an account rejecting his claim, if ratified, will not be opened at his instance to allow him to produce further proof, though the fund is still in the hands of the trustee.

Where an order has been passed directing the Auditor to state a *final account*, still, if the fund has not been parted with by the court, creditors who had not come in at the period of the passage of such order will be allowed to do so, but new proof will not, after such order, be allowed in support of claims already filed.

After an appeal is taken and an appeal bond executed and approved, no step in the cause can be taken which by any *possible contingency* can prejudice the appellant.

An order distributing a fund among a certain class of creditors and excluding others, was appealed from by one of the parties whose claim had been admitted to a dividend, but those excluded did not appeal. **HELD—**

That after such appeal taken and bond given, the court cannot order the dividend allowed to one of the creditors not appealing to be paid to him.

The court has the power to direct a fund in court to be invested pending an appeal, notwithstanding some of the parties interested in the fund may refuse their assent to such investment.

[The first opinion of the Chancellor in this case is reported in 2 *Md. Ch. Decisions*, 25. Since that time other proceedings have taken place in the cause, and several important questions

raised and decided by the Chancellor in the opinions reported below, the first of which was delivered on the 10th of January, 1850, upon exceptions to the report of the Auditor.]

THE CHANCELLOR :

This case now comes before the court upon exceptions to the report of the Auditor, and has been fully argued by the counsel of the parties.

Some of the questions discussed at the bar, will, I apprehend, be found to be covered by the opinion and order of this court of the 5th of December, 1848. In that opinion it was said, "that the notes of Hancock & Mann held by Winn & Ross, trustees of Samuel Jones, Jr., which bear date prior to the mortgage of the 11th of April, 1846, are not entitled to the benefit of that security and must be excluded from participating in the fund raised, or to be raised, by a sale of the property embraced in it." 2 *Md. Ch. Decisions*, 37.

The order of the court changes the phraseology a little, and declares that such notes *made* prior to that date are to be excluded. But this order is to be construed with reference to the language used in the opinion, and must be understood to exclude notes which bear date prior to the date of the mortgage.

I am not prepared to say that there is no proof of the identity of the notes alleged to have been *antedated*, but if parties with a security before them applicable to a particular description of responsibilities, choose, of their own accord, to create written obligations which, upon their face, are not within the security, I think it would be a bad precedent to permit them by parol to bring them within it. I am, therefore, of opinion, that the notes in question, alleged to be antedated, are not entitled to a dividend of the fund to be distributed.

This opinion is not founded upon the idea that antedating notes is, *per se*, fraudulent, or evidence of a dishonest intent. The cases referred to by the counsel for Winn & Ross establish the contrary; but without looking to or criticising the intent, I think the parties have given the paper a character which excludes it from the security. The notes of Jones, given in ex-

change for these three notes of Hancock & Mann, were put in the market and negotiated as notes made on the day they bore date. They became legally operative instruments from that period, and the corresponding notes of Hancock & Mann must be regarded as coming into legal existence at the same time.

Since the former order of this court, a petition has been filed in the cause by Johns Hopkins and others, who allege that they hold sundry notes of Samuel Jones, endorsed by Dawson & Norwood, and which were given by the said Jones in exchange for the notes of Hancock & Mann, secured by the mortgages, and they claim by substitution, such dividends of the funds to be distributed, as would be payable to the trustees of Jones in case the said notes had been retired by him or his trustees. And the question most seriously discussed upon the present argument relates to their right of subrogation.

Before expressing, very briefly, my opinion upon this question, I will observe, that I think there is evidence upon which it may be fairly inferred that much of the paper of Jones now introduced in this cause, was given in exchange for the paper of Hancock & Mann, in the possession of his trustees. I think the testimony of Jacobson, the clerk of Jones, his memory being aided and refreshed by the entries in the ledger kept by him, and in which the original entries of these transactions were made, does establish the fact of such exchange with reference to a number of these notes, and I am of opinion, that the Auditor may, upon his proof, taken in connection with the ledger, ascertain with a reasonable degree of certainty which of the notes there entered were given in exchange for the notes of Hancock & Mann.

In the former opinion of the court it was said, that the trustees of Jones could not be permitted to receive dividends upon all the notes of Hancock & Mann, whether the counter notes given by Jones had or had not been paid, and before it was ascertained what dividends his estate would pay the holders of them.

The dividends to be paid to the trustees were to be measured by the dividends which they should pay to the holders of the

paper of Jones given in exchange for that of Hancock & Mann. It follows, therefore, that if these trustees could have shown that they had paid all such notes, they would have been entitled to a dividend upon the whole amount of the paper of Hancock & Mann in their possession. But the holders of this paper of Jones now come in and say, here it is, pay us directly the dividends which the trustees would have received if they had paid the notes. We ask the court to substitute us to the rights which would have been vested in these trustees if they or Jones had paid his notes.

The notes of Hancock & Mann held by them, come within the terms of the mortgages, and to secure which they were executed, and the only defect in their title to participate in the fund arises from the fact that the notes of Jones given in exchange have not been paid. But the petitioners produce his notes and thus supply the absent link in the chain of title. If the dividends are not paid to the holders of this paper of Jones, the money must go back to Hancock & Mann, although when they negotiated the paper of Jones, it must be presumed, they received value for it. This would clearly be inequitable, and the only way to avoid it is by resorting to the doctrine of substitution and ordering the dividends to be paid directly to the holders of the paper given by Jones. The objection to this application of the fund arises from the fact, that the notes of Jones do not come within the literal terms of the mortgages, which speak of "notes or bills of exchange made, accepted or endorsed by Hancock & Mann, and by them passed to Dawson & Norwood." But the substantial object of the arrangement was to secure Dawson & Norwood, for responsibilities to be incurred by them upon commercial paper made for the accommodation of the mortgagors, and, I, therefore, think, that it extends to and covers all such paper, for the payment of which Dawson & Norwood became liable, and as the paper of Hancock & Mann, held by the trustees of Jones is of that description, I can see no reason why it should not in equity be regarded as the property of those parties who hold the paper given by Jones in exchange for it. Suppose Jones, instead of giving his own notes in exchange for

this paper of Hancock & Mann, endorsed by Dawson & Norwood, had put his name to it as endorser, and passed it for value, could there be a doubt of the right of the assignees to share in the fund? But if instead of doing so, he passed his own notes to Dawson & Norwood in exchange, which notes were endorsed by them, he, Jones, retaining the notes of Hancock & Mann, why should not the parties who receive these notes of Jones be, by substitution, considered as the holders of the notes of Hancock & Mann, and as such entitled to the benefit of the security?

My opinion, therefore, is, that the petitioners, Hopkins & Brothers, and the other parties who hold the paper of Samuel Jones, endorsed by Dawson & Norwood, which paper was given in exchange for the paper of Hancock & Mann, now in the possession of the trustees of Jones, are to be treated as if they held this latter paper, and entitled to dividends of the fund. And when, upon the paper of Jones, the names of Dawson & Norwood do not appear, the same right of substitution exists, when upon that of Hancock & Mann, for which such paper of Jones was given in exchange, Dawson & Norwood are endorsers, the object of the mortgages being to secure Dawson & Norwood.

The Auditor, in his report of the 10th of July, 1849, says that it appears that no part of the paper given by Jones in exchange for the paper of Hancock & Mann, endorsed by Dawson & Norwood, has been paid by Jones, and submits whether any portion of the fund should be assigned to his trustees, Winn & Ross, and whether, as soon as it shall clearly appear how many of the claims filed are really entitled to substitution as exchange paper, they ought not to receive their proportion of the fund, to the exclusion of said trustees.

That these trustees can receive no part of these funds until they shall have paid in whole or in part the notes given by Jones in exchange for those of Hancock & Mann, in their possession, has been already decided. This is not the case of cross paper, given for mutual accommodation, when each party is liable to pay his own. The paper of Hancock & Mann was not to be, nor was it in fact, negotiated by Jones. He held it

as security for the loan of his own paper, given in exchange for it. The case is not within the principle of the cases referred to, which prove that the holder of cross paper may prove under a commission, by taking up his own note, or exonerating the estate of the bankrupt. 3 *Denio*, 187; 1 *Eden on Bankrupts*, 150, 160, 163; *Byles on Bills*, 343, 344; 4 *Taunt*, 200; 7 *Term Rep.*, 565; 2 *Term Rep.*, 100. It is not enough to entitle Winn & Ross to a dividend that they show the estate of Hancock & Mann will not be exposed to a double charge. They must show that the estate of Jones has been damnified by his paying his own notes issued for the paper of Hancock & Mann. If none of these notes have been paid by Jones, as stated by the Auditor, then they must be outstanding, and the holders of them, and not Jones or his trustees, are the parties who, by substitution, are entitled to participate in the fund.

My opinion, therefore, is, that the trustees of Jones are not entitled to dividends, simply because they hold the paper of Hancock & Mann, and that unless they can show that the paper of Jones, exchanged for it, has been paid, they must be excluded.

I am of opinion that the exception taken by the complainants to the account stated by the Auditor between the mortgaged estate and Clark & Kellogg, cannot be supported, and the exception will be overruled.

The petition of Clark & Kellogg, for the advance to them of a fee to counsel, to be paid out of the money in their hands, cannot be allowed except upon the ground of consent. No precedent for such an allowance can be found, and it is readily perceived that the principle upon which it is claimed would make this court, in a great number of cases, the medium by which the fees of counsel would be adjusted. Allowances of counsel fees are made under the head of just allowances to trustees, but it is believed that neither in this country nor in England was a stakeholder, even viewing Clark & Kellogg as occupying simply that character, ever allowed counsel fees out of funds in his hands.

I am also of opinion that the claim of Wells & Miller, under the mechanics lien law, cannot be supported, the evidence brought in since the order of the 15th of December, 1847, not removing the objections which appeared then, and seem to me now fatal to said claim. The exceptions, therefore, of these parties, to the report of the Auditor, will be overruled.

With regard to the question of the amount of materials on hand when the mortgaged premises were taken possession of by Dawson & Norwood on the 19th of June, 1846, I am of opinion that it must be assumed from the evidence that they were worth \$18,000, and that the account of the Auditor, founded upon that assumption, is correct. The deficit upon that assumption, as shown by the Auditor's report of the 3d of December, 1849, is but \$499 12, and looking to the previous operations of the factory, it may, I think, reasonably be supposed that that small sum was lost by the same causes which had swept away so much capital.

The account of the Auditor, founded upon this estimate, cannot now be affirmed, because it assigns portions of the proceeds to Winn & Ross, trustees of Jones, they being, in my opinion, entitled to nothing, inasmuch as no part of the notes of Hancock & Mann, held by them, have been paid.

The case, therefore, will be referred to the Auditor, to state a final account, distributing the entire fund among the parties entitled, according to their rights as hereinbefore decided, it being now fair to infer that all the holders of the paper of Jones, given in exchange for that of Hancock & Mann, have come in.

[An order was passed on the 10th of January, 1850, referring the cause to the Auditor, in accordance with the foregoing opinion. The Auditor afterwards made a report, and stated several accounts to which exceptions were again filed by the parties. Upon the hearing of these exceptions, the following opinion of the Chancellor was delivered on the 21st of May, 1850.]

THE CHANCELLOR :

Since the order of the 10th of January last, the Auditor has made a further report, and stated sundry accounts to which exceptions have been filed by the parties, and the questions having been argued orally and in writing by the solicitors of the parties, are now, by agreement, submitted for decision.

The cause has been depending since October, 1846, and it is to be regretted that so much time has been consumed before the parties really entitled can receive the benefit of the fund intended for them. I am persuaded, however, when the circumstances connected with this case are considered, and the number and variety of the questions which have been raised and discussed are brought into view, that however much we may regret the delay, it will be quite apparent that the causes which have produced it are abundantly sufficient for the purpose.

Since the order of the 10th of January, a number of additional claims have been filed, and a portion of these having been allowed by the Auditor, the last argument has been directed chiefly to the question whether, as against the plaintiffs, who have plead the statute of limitations, these claims are barred?

According to the established rule of this court, adopted and approved of by the Court of Appeals, "the statute of limitations runs against a claim or debt down to the time it is exhibited." And as the claims in question are founded upon promissory notes, and more than three years have elapsed between their maturity and exhibition in this court, the bar, so far as the plaintiffs are concerned, would be complete, and they would, with respect to the plaintiffs, be excluded if there was nothing in the case to save them from the operation of the statute. *Hall vs. Creswell*, 12 G. & J., 48.

These creditors are here seeking payment of their claims out of the proceeds of mortgaged property pledged for their security, they being, according to the former opinion, subrogated in the place of those whose claims come within the terms of the mortgage, and it therefore appears to me that unless the de-

fence of limitations would have been available as against the parties to whose rights they are substituted, it cannot avail as against them. The mortgage in this case, as has been said, was executed for the security of Dawson & Norwood, and when parties are found in possession of claims against which, by the terms of the instrument, they, Dawson & Norwood, were entitled to be indemnified, those parties are, with respect to the security, clothed with their rights, and are only to be defeated upon grounds which would have been good as against them. It is admitted, that if a promissory note is secured by a mortgage, the mortgagee having the legal title, is not ousted by his note's being barred, because (as it is said in the argument) the debt only is barred, and the party holding the title may retain his legal advantage.

But here we are dealing with a case in which, upon a principle of equity, the doctrine of substitution is resorted to, by which the party having in equity a title to the benefit of the security is put in the place of him in whom the legal title has vested. This consequence appears to me to be involved in the principle of substitution, and that it would be wholly incomplete and fall far short of working out the end for which it was designed if it was not fully carried out to this extent. If, then, these creditors are substituted in equity in the place of the mortgagees, (as I think they are entitled to be,) it follows that with respect to the proceeds of the mortgaged property, the plea of limitations relied upon by these plaintiffs is not a bar. The opinion of the Chancellor in the case of *Heyer vs. Pruyn*, 7 *Paige*, 465, impairs very much the weight of Mr. Justice Sutherland in 7 *Wend.*, 94, and takes, as I think, the true distinction between a suit on the note secured by a mortgage, and a proceeding upon the mortgage itself to affect the mortgaged property, a distinction very clearly drawn by the Court of Appeals of this state in the case of *Watkins vs. Harwood*, 2 *G. & J.*, 307. The case of *Hughson vs. Mandeville & Snowden*, 4 *Desaussure*, 87, I have examined, but do not think it asserts a doctrine at all inconsistent with the conclusion which I have formed in this case.

It is also objected that the allowance of the claims filed since the order of the 10th of January last, that they come in too late, because it is said that order directed the Auditor to state a final account, it being as expressed in the opinion fair to infer that all the holders of Jones' paper given in exchange for that of Hancock and Mann, had already come in.

In cases like the present, the practice of the court is to allow creditors to come in at any time before a distribution of the proceeds of the sale has been actually made. So long as the fund is under the control of the court, it will let a creditor in who has been guilty of no negligence, and if necessary send the case to the Auditor to have a new account stated at his expense, as it must frequently happen that notwithstanding the usual method is resorted to to notify creditors, they are not in fact apprized of the proceedings. *Strike's Case*, 1 *Bland*, 86; *Hammond vs. Hammond*, 2 *Bland*, 364. If, to be sure, a creditor has been notified of the proceedings, and after a reasonable time allowed him to support his claim by proofs, he has failed to do so, and an account rejecting his claim because of such failure has been ratified by the court, it will not be reopened at his instance to permit him to introduce fresh evidence, though the fund still remains in the hands of the trustee. *Kent vs. O'Hara*, 7 *G. & J.*, 212. But, as observed by the Chief Justice in that case, if the claim of the creditor had not been submitted to the Chancellor, and passed upon before the fund remaining in the hands of the trustee had been parted with, it would have presented a different case.

In this case these additional claims which have been filed since the last order have not been before submitted to the Chancellor, and passed upon by him, and, therefore, I think if they are sufficiently sustained by evidence, the holders of them are entitled to participate with the rest of the creditors in the fund to be distributed.

The mortgages in this case, as has been several times said, were executed for the security of Dawson and Norwood, and therefore, as has already been decided, the holders of the paper of Jones, endorsed by these parties, given in exchange for the

paper of Hancock and Mann, held by the trustees of Jones, are entitled to dividends of the fund. And when upon the paper of Jones the names of Dawson and Norwood do not appear the same right exists and founded upon the same principle of substitution, when their names do appear upon the paper of Hancock and Mann for which the paper of Jones was given in exchange.

The Auditor states in his last report that he has admitted into the account, filed therewith, all of the claims filed where the exchange and counter notes appear to have been dated after the 11th of April, 1846, and where the names of Hancock and Mann appear on either the exchange or counter notes.

This course on the part of the Auditor is supposed to be in conflict with the former judgment of the court which, according to the argument filed by the solicitor of one of the parties, determines that the right to participate in the fund depends not upon the date of the notes of Hancock and Mann, but of those of Jones given in exchange. Such, however, is not the view taken in either of the former opinions in this case. Upon this point it was said in the opinion of the 10th of January last, "that the notes of Hancock and Mann, held by Winn and Ross, trustees of Samuel Jones, Jr., which bear date prior to the mortgage of the 11th of April, 1846, are not entitled to the benefit of that security, and must be excluded from participating in the fund," &c. And as the holders of the paper of Jones given in exchange for that of Hancock and Mann are let in upon the principle of substitution, it would necessarily follow that the parties holding it are placed precisely in the condition they would have occupied if they held the obligations of Hancock and Mann, and that if the latter would have been excluded because dated prior to the mortgage, so must the former. This seems to result from the principle of substitution which places the substitute in all respects in the place of the party substituted. I am of opinion, therefore, that the Auditor was right in excluding the notes in question from dividends of the fund.

By the order of the 10th of January last, the cause was re-

ferred to the Auditor with directions to state a *final account* distributing the entire fund among the parties entitled according to their rights as therein decided.

As has already been said, it is not in conformity with the practice of this court, nor as I conceive consistent with the justice of the case, when the fund has not been parted with to exclude the claims of creditors who had not come in at the period of the passage of such an order. So long as the money is under the court's control, no creditor will be shut out who has not had an opportunity of establishing his claim, and therefore it is that I am of opinion that the creditors who have come in since the date of that order, are entitled to have their claims examined and passed upon unprejudiced thereby or by any previous order of the court. But I do not think it would be compatible with the due administration of justice and the rights of the other creditors to give further time for the production of evidence in support of claims not now sufficiently proved.

The order of the 10th of January in express terms directed the Auditor to state a *final account*, and it must be presumed that all the creditors, as well those whose claims had then been filed as those who have come in subsequently were aware of the nature of that order, and of the necessity of fortifying their claims by the requisite evidence. And not only were they by the terms of this order notified that the account was to be a final one, but the nature and kind of proof necessary to establish their claim was plainly indicated in the former opinions of this court.

The rejection of claim No. 30 is approved of, as is also the rejection of claims numbered 31, 32, 33, 34, 35, 36, 37, 38, 67, 69, 70, 71, 72, 68, 73, 74.

The Auditor states that claims numbered 42, 54, 55, 56, 57, 64, 65, and 66, were drawn in blank, and neither the names of Hancock and Mann nor of Dawson and Norwood appear upon them, and that Nos. 43, 46, 47, 49, and 59 are drawn in blank or in favor of Hancock and Mann, and by them endorsed, but the counter notes of Dawson and Norwood have not been filed and collaterals appear to have been given for them which he submits should be accounted for. My opinion is, that claims

founded upon notes upon which the names of Hancock and Mann and Dawson and Norwood do not appear, either upon the notes given or taken in exchange should be excluded, and that all claims should be likewise excluded when the counter notes of Dawson and Norwood are not filed, and I also think that where collaterals have been given, they should be accounted for or the claims on account of which they were given should be excluded.

As some of the claims designated by the numbers mentioned in the last paragraph have been admitted by the Auditor, it will be necessary to send the case again to him, when the claims will be excluded unless the counter claims of Dawson and Norwood are filed and the collaterals accounted for.

It is, thereupon, ordered this 21st day of May, 1850, that this case be and the same is hereby referred to the Auditor to state a final account, distributing the fund among the parties entitled upon the principles, and according to the directions hereinbefore given. And as upon the petition of the solicitor I am of opinion that there should be a taxation of costs as between solicitor and client, and that all parties who participate in the fund should contribute to the payment of the fees so to be taxed. It is further ordered that said solicitor be allowed a fee of three hundred dollars out of said fund. All exceptions at variance with this order are overruled.

[A further opinion was delivered by the Chancellor on the 4th of November, 1850, upon the petition of George R. Vickers, filed in the cause since the passage of the last order. The facts upon which this petition is based and the questions raised by it are fully stated in said opinion, which is as follows.]

THE CHANCELLOR:

This case is brought before the court upon the petition of George R. Vickers, filed on the 28th of the last month, praying that a dividend allowed him out of the fund due from and brought into court by Clarke and Mankin may be paid, notwithstanding the appeal taken by Mr. Glenn from the orders of the court under which the accounts of the Auditor were stated, and

though he has given an approved appeal bond for the due prosecution of that appeal.

The question presented by this petition is of great practical importance, and no precedent has been produced, and I am aware of no case in which the point now raised has been decided.

That the right of appeal should be preserved inviolate, no one will deny, and that nothing should be done by the court from whose judgment the appeal is taken to abridge, or in any way to impair, its enjoyment or to interfere with the substantial object of the privilege, is a proposition too clear to admit of doubt. Certainly this court feels no disposition to do so, and therefore, when it is asked to take a step in a cause, after an appeal taken and bond given for its due prosecution, it is indispensably necessary that it should be shown beyond all reasonable doubt that the step which it is called upon to take can, in no contingency which is at all likely to appear, prove injurious to the appellant. The reason for this is obvious. The party appealing can only arrest the execution of the judgment or decree of the court, of which he complains, by giving bond in an adequate penalty and with approved surety to indemnify the other party for any loss or injury he may sustain by reason of the delay. The latter, therefore, though he may not get the fruits of the judgment of the court in which he has been successful, so early as he otherwise would, is protected from loss by the appeal bond, if in the opinion of the superior court he has a title to such indemnity. But, if on the other hand the inferior tribunal proceeds notwithstanding the appeal, to execute its judgment, either in full or partially, upon the hypothesis that in any event which in its view of the case is likely to appear, the appellant will not be aggrieved by such complete or partial execution, and in the opinion of the superior court the entire judgment of the court below shall turn out to be erroneous, it is quite obvious that serious and irreparable injury may be done, because the party who has thus reaped the fruits of the recovered judgment has given no indemnity to the opposite party, and may himself be insolvent or inaccessible to his prosecution.

The argument in this case is, that as the claims of Mr. Glenn, who has given the bond, just exceeds \$4,000, a full indemnity will be secured to him by retaining that amount, with such additional sum as may be required to cover interest and costs. But in the view which I take of this case, a state of things may very well happen, which would render this course altogether wrong, and in its results any thing but just to the appellant. The orders of this court, under which these funds have been distributed, exclude a particular class of creditors, as not within the protection of the mortgage, and also certain other claims, as insufficiently proved. These orders are appealed from, and in case the Court of Appeals should reverse my decree, they will, as was decided in the case of *Diffenderffer vs. Winder*, 3 G. & J., 311, "exercise, as it were, an original equity jurisdiction, and place such a decree upon the record as the Chancellor ought to have passed."

Now, suppose the Court of Appeals should think that this court erred in excluding the holders of the notes of Hancock & Mann, which bear date prior to the mortgage of the 11th of April, 1846, or in excluding any other class of creditors for any cause, and should decide that all should come in and participate in the fund, is it not apparent that if Mr. Vickers, and the creditors who are now let in, should be permitted to receive their dividends, swelled as they are by the exclusion of those above referred to, that a manifest wrong would be done to the appellant? In that event Mr. Vickers and the others would receive more, and the appellant less, than his due proportion of the fund. It is, as I conceive, no answer that the creditors of the excluded class have not appealed, because if the decree of this court should be reversed, the appellate court will decide the cause in the exercise of a *quasi* original jurisdiction, and may direct many creditors to come in and take shares of this fund who have been shut out.

If the application of this petition is granted, it follows of course, that all others situated like him must be likewise paid, the court simply retaining so much of the fund as may be necessary, in its judgment, to indemnify the

appellant. The course now proposed would be establishing a new, and, as it seems to me, dangerous precedent, and one which may in this particular case result in consequences injurious to the appellant. The argument is, that if money enough is retained to cover the dividends allowed the appellant, with interest and costs, this cannot happen, and that the court should not extend the operation of the appeal, and the effect of the appeal bond further than may be necessary to secure this object. It has been already shown, however, that the Court of Appeals may, upon this appeal, if the decree of this court is reversed, entirely recast the accounts by letting in claims and classes of claims which have been excluded, and thus prejudice the appellant, if the petitioner is permitted to receive the dividend which has been allowed him by these accounts.

There is, moreover, another view, which demonstrates conclusively, as I think, the impropriety of paying the petitioner his dividend until the appeal shall have been decided. It will be seen, upon reference to the exceptions of the appellant, Glenn and others, to the Auditor's report, that the claims of the petitioner, Vickers, numbered 61, 62 and 63, are specially objected to, as not entitled to participate to any extent in the fund for the reason set forth in the exception. Now, suppose this exception, which has been overruled by the order of this court, should be sustained by the Court of Appeals, is it not manifest that the appellant may be aggrieved, if notwithstanding the appeal and bond, the dividend to Vickers should be paid? The ground of the exception is, that these claims of Mr. Vickers should not be permitted to come in upon the fund at all. But this court thought they were entitled to come in, and let them in, and thus diminished the dividend allowed to Mr. Glenn, the appellant, and the propriety of this decree of the Chancery Court is the question to be decided by the Court of Appeals. If the appellant succeeds upon his appeal, his dividend will be augmented, and yet it is said he can receive no prejudice if the court retains as much money as will pay the dividend awarded him by these accounts, although that dividend is undeniably less than it will be if his appeal to the Superior Court is successful.

Assuming that the Court of Appeals will reverse the decrees and orders of this court, (and the petitioner Vickers must make out his right to be paid his dividend in the present state of the case, upon that assumption,) and new accounts will necessarily have to be stated. How these new accounts will affect the rights of parties will, of course, depend upon the character of the judgment which may be pronounced by the Court of Appeals. The petitioner's dividend may be augmented, or it may be diminished, or he may be altogether excluded, and therefore to pay him now will be exposing the appellant to the risk of loss. The very object of his appeal and of the bond he has given, is to protect himself against this risk, and he is entitled to this protection, the bond furnishing the other party an indemnity for such injury as he may sustain by the delay in case the appeal should be unsuccessful.

It may be that in a perfectly clear case, that is, when this court could see that the execution of its order could in no *possible contingency* prejudice the party appealing, that it would direct its execution. But it must be a case which would admit of no doubt, and perhaps in any case, however clear this court might see its way, such a course might be regarded as an undue stretch of authority, as the act of Assembly regulating writs of error and granting appeals, directs, by plain implication, that when a bond is given as prescribed by the act, the judgment or decree appealed from shall be stayed and delayed.

Now, in this case, the order of the 24th of July, 1850, under which the petitioner asks to be paid his dividend has been appealed from, and a bond given to prosecute the appeal according to the act of Assembly. The order, therefore, is stayed. Its power is suspended by virtue of the appeal and bond, and for this court to undertake to carry it into execution, notwithstanding the party appellant has done that which the legislature has said shall operate to stay its order, would seem to be an usurpation of authority. The case, indeed, must be strong and flagrant, which would justify such a course of proceeding. The present is not such a case, and, therefore, the application must be refused.

The next question has reference to the disposition which must be made of the money in court pending the appeal. One side asks that it may be invested so as to be productive, whilst the other objects, and denies the authority of the court to make an investment without consent. The amount is large, amounting to near twenty thousand dollars, and as some time may elapse before the appeal is decided, it would be a subject of regret if by the objection of any one of the litigating parties the whole body of creditors shall be made to suffer the serious loss which would result from keeping idle so large a sum of money for the period which is likely to intervene before the controversy is brought to a close.

If by the objection of several of the creditors, or those who appear to be creditors, the fund must remain unproductive, and the doctrine established that consent is necessary, then it would seem to follow that the consent of all must be obtained, and that if any one refuses his assent, all the rest must be made to suffer. This I do not understand to be the rule of this court. The money is in its care, and I consider it bound in justice to those who may be ultimately entitled to receive it not to permit any one of the contesting parties to say it shall remain locked up and unprofitable until some future and indefinite period, or until he gives his assent to its investment. In the present state of the case it is impossible to say who may be entitled to this fund. The very object of the appeal is to settle that question, and it would therefore seem strange to allow any one of the claimants, whose title is controverted, to say, authoritatively, nothing shall be done with the money without my consent.

The court, therefore, will order an investment, but as the amount is large, and it would be satisfactory to receive the suggestions of those who appear to be entitled to it, as to the character and mode of the investment, a short time will be allowed to hear from them upon the subject.

[On the 30th of the same month, November, 1850, the Chancellor passed the following order in the cause.]

THE CHANCELLOR :

The consideration of the petition of George R. Vickers, filed on the 7th instant, was deferred to this day, and notice given to the petitioner's counsel, who desired to be heard. The questions now must be disposed of without further delay.

In the opinion delivered by this court on the 4th of the present month, its authority, and the propriety of investing the large amount now lying idle, pending the appeal, was asserted, and the power to make the investment is believed to be fully supported by the case of *Latimer vs. Hanson*, 1 *Bland*, 51, in which two successive Chancellors of this court maintained the power without requiring or waiting for the assent of all the parties interested.

The investment, therefore, must be made in the stock debt of the state of Maryland, or of the city of Baltimore, the application of the petitioner, Vickers, and of certain other parties to receive the dividends upon giving refunding bonds being deemed inadmissible.

Mr. Glenn in his answer to this last petition offers to make the investment without charge on his part, whilst it is fairly to be inferred from the terms of the recommendation of Mr. Alexander that he is to be compensated in case he should be appointed trustee for the purpose. Indeed, without his previous consent to forego commissions, he could not be denied some compensation for the service.

[An order was then passed appointing Mr. Glenn trustee to make the investment as above directed, upon giving bond with approved security.]

WILLIAM PHILPOTT

VS.

IRWIN ELLIOTT.

}

DECEMBER TERM, 1851.

[SPECIFIC PERFORMANCE—POWER TO CORRECT ERROR IN WRITTEN AGREEMENTS.]

It is competent for a party in a court of equity to offer parol evidence of a mistake in a written agreement relating to lands, have it rectified and then specifically executed as rectified.

But before the agreement will be reformed and executed as reformed, the mistake, and the proposed correction, must both be made out in the clearest and most unequivocal manner.

Specific execution of contracts in equity is not a matter of absolute right but of sound discretion in the court, and unless the court is satisfied, the application is fair, just, and reasonable in every respect, it will abstain from interfering.

[The bill in this case was filed on the 23d of June, 1850, in the equity side of Baltimore County Court, from which it was removed to the Court of Chancery. The facts of the case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

Whatever doubts may have been entertained as to the state of the law prior to the case of *Moale vs. Buchanan et al*, 11 G. & J., 314, there certainly can be no doubt now that it is competent to a party in a court of equity to offer parol evidence of a mistake in an agreement in writing relating to lands, to have it rectified, and then specifically executed as rectified.

Cases establishing a contrary doctrine may readily be found, but these were repudiated by Chancellor Kent, who permitted the parol proof to be offered establishing the mistake, reformed the agreement according to the proof and specifically executed it as reformed, and the principle thus settled, was approved and affirmed by the Court of Appeals in the case referred to.

The bill in this case asks for the application of this principle. It alleges, that on the 19th of September, 1849, a lease was executed by the defendant to the plaintiff, of a lot of ground in the city of Baltimore, upon the terms therein mentioned, in

which an error very prejudicial to the interests of the complainant was committed, and the object of the bill is to have this error rectified, and a new lease executed conforming to the real intention of the parties.

The imputed error consists in the second line of the lot, as described in the lease, according to which it is made to run from the termination of the first line on Baltimore street, "northerly seventy-five feet, running at right angles with Baltimore street," when, according to the statement of the bill and the pretension of the complainant it should have run "northerly in the direction of the most northerly angle of the entire of said lot, seventy-five feet."

A glance at the plat among the proceedings, will show how very material this supposed mistake is, for if the line in the lease is the true one, and the parties are to hold according to that line as laid down, the complainant will not only lose a considerable portion of the area of the lot claimed by him, but he will also be deprived of a part of the ground upon which his house stands, and on the other hand, if the line insisted upon by the complainant is the true one, the defendant will lose a portion of his houses back and front.

The defendant, though he maintains in his answer, that the portion of the lot which he agreed to lease to the complainant is accurately and correctly described in the lease, does not contend for the location thereof as made by the surveyor, but insists upon a line which shall conform with the improvements made by the parties upon their respective lots, and which is indicated by a fence as located upon the plat, and contends that such is the true and legal location of the lease according to the adjudged cases.

As there is no absolute necessity for it, I do not propose to decide this question, which belongs more properly to a court of law, and could only be authoritatively decided there in an action of trespass or ejectment. I deem it sufficient here to say, that a reasonable doubt may be entertained in regard to the true construction of the lease, and that it is not certainly so free from ambiguity as to render the interposition of this court

wholly unnecessary in the form in which its aid is invoked, and that if a proper ground is laid, it is its duty to interfere to prevent future litigation.

But, though this court has unquestionably the power to grant the relief prayed by the bill, provided a clear case of mistake is made out, it is indispensably necessary the alleged error be demonstrated in the clearest and most unequivocal manner. for if there be a reasonable doubt upon the subject, the court must withhold its aid.

The necessity of furnishing proofs to the entire satisfaction of the court before it will act in cases of this description, is shown by the case of *Hall & Gill vs. Clagett*, 2 *Md. Ch. Decisions*, 153, and the authorities there referred to. And it is not only necessary that strong evidence be produced that a mistake was committed, and that the agreement signed by the parties, does not conform to their intentions, but the stipulation proposed to be introduced, or the correction proposed to be made must be established by equally conclusive proof. Before the agreement will be reformed, and executed as reformed, the court must be perfectly satisfied what the real intention of the parties was, or otherwise it will not interfere.

Upon looking at the plat, in this case, there is great difficulty in believing that the defendant, with a full knowledge of the consequences to himself, could have agreed to the line claimed by the bill, and there is evidence that he, upon some occasions, protested in the strongest terms against that line. There is, however, evidence the other way, and in my opinion, as between the lines described in the lease and the line claimed by the claimant as the true line, the preponderance of the proof is in favor of the latter, as there cannot be the slightest doubt of the perfect and entire respectability and credibility of the witnesses who have testified upon the subject.

But still looking to the whole evidence, and seeing how seriously the rights of the defendant would be prejudiced by establishing that as the true line, I cannot bring myself to think, that the defendant, with a full understanding of its effect, gave his consent to it.

Supposing, however, that the agreement, founded upon the extreme improbability of the thing, was less strong than it certainly is, there are reasons of great weight why the court should not rectify the contract as claimed in this respect, and decree its specific execution as corrected. The evidence shows, that the defendant is a carpenter, and that he has erected a house on the lot claimed by him, and that he has also built a house on the complainant's lot, and further, that the complainant was frequently at the house when it was in a course of construction, that he knew the dividing line between his lot and that of the defendant was run so as to conform to the improvements on both lots, and that he expressed no dissatisfaction. And it is admitted in the record, the complainant has been in possession of his house since September, 1849, and is still in possession.

And the proof further shows, that the parties run a dividing line between them, and put up a fence upon that line, which fence is laid down upon the plats, and steers entirely clear of the improvements on both lots. That such a line was run and fence erected, there can be no doubt, and that the buildings and improvements of the parties have been in conformity with it. And it is apparent, that if the complainant is successful in his present application, to the full extent of his claim as asserted by the bill, he will not only get rid of this line, but will take from the defendant a part of the ground upon which his house stands, which he stood by and saw him erect, as some of the witnesses say, without objection or complaint. This circumstance, as it seems to me, is fatal to the prayer of this bill to the full extent to which it goes, it being established upon authority, that the specific execution of contracts in equity is not a matter of absolute right, but of sound discretion in the court, and that unless the court is satisfied that the appeal to it for this extraordinary assistance is fair, just and reasonable in every respect, it will abstain from interfering. This was the principle maintained by this court in the case of *Waters vs. Howard*, 1 Md. Ch. Decisions, 112, which upon appeal to the Court of Appeals was affirmed.

Now, it appears to me, that, in view of the fact that a line has been run as has been mentioned, and that the complainant did not interfere, in due season, to prevent the defendant from erecting improvements upon his lot, but stood by and saw such improvements erected without objection, it would be any thing but fair, just and reasonable, now to establish by the power of this court, such a line between him and the defendant as would take from the latter any part of his improvements. It appears to me, that justice between the parties will be more certainly accomplished by taking the building line, and continuing that line as indicated by the fence to the end thereof, thence easterly parallel with Baltimore street to Cove or Fremont street, thence southerly with Cove or Fremont street to the place of beginning at A. on Baltimore street. The parties themselves seem to have fixed upon this line, and there is nothing in the bond of conveyance executed and delivered by the defendant to the plaintiff, and which has been produced by the latter in obedience to the order of Baltimore County Court, passed upon the petition of the defendant, which in the slightest degree militates against it, because the distance between the end of the second line and Cove street is left blank, showing that the parties did not at the date of its execution, (which was the 4th of June, 1849,) know precisely how the line would run. The contract in that respect was incomplete, and the parol evidence in relation to the buildings, and the fence supplies the defect, and shows, I think, very satisfactorily how it was understood the line should be run.

Upon the whole, my opinion is, that a new lease should be executed, establishing a line of the buildings and the fence as the dividing line between these parties, and I shall pass a decree accordingly.

The counsel on either side may prepare a decree in conformity with this opinion, appointing a trustee, or directing the defendant to execute the lease, and directing the parties, respectively, to pay their own costs.

McLAUGHLIN and BUCHANAN, for Complainant.

WHELAN, for Defendant.

GEORGE BENSON AND OTHERS
 vs.
 JOEL WRIGHT AND JOHN MARFIELD. } DECEMBER TERM, 1848.

[CONSTRUCTION OF WILL—PER CAPITA DISTRIBUTION—PRACTICE.]

A TESTATRIX devised a portion of the residue of her estate to certain trustees in trust "for the use of the children of M. S., the children of W. B. and G. B., equally as tenants in common, their heirs and representatives forever."

HELD—

That the children of M. S. and W. B., born *since* the death of the testatrix, are to be excluded from the benefit of this bequest, but all their children born prior to that period, and G. B. take *per capita*, and equally.

The answer of an infant by his guardian is not evidence against him, and the necessity of establishing the case as stated in the pleadings by proof is not obviated by making the infant a plaintiff.

[In this case, the construction of the following clause of the will of Hannah Benson, executed on the 5th of July, 1845, was submitted to the Chancellor. The testatrix had devised all the residue of her estate to the defendants, in trust, as to one-half for the benefit of certain parties, and the will then contains this clause. "And as to the other half of said estate and property in trust for the use of the children of Margaret Swornstedt, the daughter of my late husband, Peter Benson; the children of William Benson, the son of my said late husband, and George Benson, also a son of my said late husband, equally, as tenants in common, their heirs and representatives forever, provided however, that if the said George Benson should depart this life without leaving a child or the descendant of a child living, then for the use and benefit of the children of his sister, Maria Catharine Forney, their heirs and assigns forever."]

George Benson, in his own right and as next friend of the infant children of Margaret Swornstedt and William Benson, some of whom were born since the death of the testatrix, filed the bill in this case against the trustees named in the will, asking the instruction of the court as to the distribution of the income of the trust estate, upon which the Chancellor delivered the following opinion.]

THE CHANCELLOR:

My opinion is, that according to the legal construction of the will of the testatrix, Hannah Benson, upon which the direction of the court is asked in this case, the child or children of Margaret Swornstedt and William Benson, born *since* the death of the testatrix, are to be excluded from the benefit of the bequest, but that all the children of these parties born prior to that period are entitled to participate equally therein with George Benson. That the children of the persons named, born before the death of the testatrix, and George Benson, take *per capita* and equally.

That the after born children are to be excluded from the distribution, and that the children living at the death of the testatrix are entitled to the fund bequeathed, seems to be settled by the cases referred to in 1 *Roper on Legacies*, 48, 49; and that the legatees take *per capita* is shown by the principles laid down in the same book, 126, 127, and *Maddox vs. State, use of Swann et al*, 4 *H. & J.*, 539.

In this case, however, infants are concerned, and as the statements in the pleadings are not evidence against them, a final order directing the distribution cannot be passed until the number, names and ages of the children of Margaret Swornstedt and William Benson shall be shown by evidence, that the court may see which of them were born subsequently to the death of the testatrix, and which prior thereto. The period of the death of the testatrix must also be shown. The answer of an infant by his guardian is not evidence against him, and I have, upon several occasions, decided that the necessity of establishing the case, as stated in the pleadings, by proof, is not obviated by making the infant a plaintiff. *Kent's adm'rs vs. Taneyhill et al*, 6 *G. & J.*, 1.

WM. J. WARD, for Complainant.

H. M. HAYDEN
vs.
DAVID STEWART, JR.

}

SEPTEMBER TERM, 1853.

[VENDOR'S LIEN—PETITION OF TRUSTEE TO RESELL PROPERTY.]

THE equitable lien held by the court for the payment of the purchase money of land sold under its decree, cannot be enforced by a trustee who has assigned the bonds given for its payment, whether the assignment was or was not made, with the sanction of the court.

The assignment of a bond given for the purchase money of land without recourse, extinguishes the vendor's lien, because so far as he is concerned, it amounts to a payment and satisfaction of his claim.

[The facts of this case are fully stated in the opinion of the Chancellor.]


THE CHANCELLOR :

This case is submitted on the petition of Frank H. Stockett, the trustee appointed in the place of Edwin P. Hayden, the original trustee, now deceased, and the answer thereto of James H. Watkins, of N., the purchaser of the property in the proceedings mentioned.

Upon the petition of Mr. Stockett, the new trustee filed on the 12th of September last, an order was passed on the 16th of the same month requiring Watkins, the purchaser, to show cause against the prayer thereof on this day, and notice having been served upon him as directed, he has filed an answer setting forth the grounds upon which he resists the application of the trustee.

The application is, that Watkins be required to pay the last instalment of the purchase money, or in default thereof that the land be resold by the new trustee for the purpose of raising the amount with interest. The petition states that at the sale made by the former trustee, Hayden, Watkins became the purchaser of the property for the sum of \$4351 20, one-third part thereof to be paid in cash, and the residue in two equal portions, in one and two years from the day of sale. That the

cash instalment and the bond for the first credit instalment were paid, but that the last instalment, amounting to the sum of \$1450 40, which became due on the 22d of June, 1850, with interest from the 22d of June, 1848, remains due and unpaid, though Watkins has been frequently called upon to pay it.

It appears by the proceedings in the cause, that this third instalment which was secured by the single bill of the purchaser, with two sureties, was, on the 14th of October, 1848, assigned by Hayden, the trustee, to Messrs. Freeland and Hall, parties ascertained to be entitled to the fund, by an endorsement on the instrument in the following words: "For value received I hereby assign and transfer the within single bill to Messrs. Freeland and Hall, and direct that payment thereof be made to them without recourse to me. Witness my hand and seal this 14th {  } , day of October, 1848. E. P. HAYDEN, Trustee."

Subsequently, to wit, on the 31st of October, 1849, these assignees, Freeland and Hall, and one Thomas Welch, who it appears was interested in the fund, exhibited their petition in the cause in which, after setting forth the proceedings, and how, and to what extent, they were interested, they make the following statement:

"Your petitioners further state that it was agreed on by and between them and the said trustee, (Hayden,) with the view of having the case in chancery finally closed, and his trust settled, that your petitioners should pay unto him the sum so as aforesaid due the said complainant, and charged on said bond, (meaning the bond given for the last instalment,) to wit, the sum of \$528 67, with interest from the 22d of June, 1848, and that said trustee would assign, transfer, and deliver said bond to your petitioners, who would thereby release said trustee from all responsibility on account of the same, whereupon your petitioners did pay said sum of money to said trustee, and said trustee did assign and transfer by endorsement in writing, and deliver said bond to your petitioners as will appear," &c.

Upon this petition certain proceedings were had, on notice to the parties interested, which resulted in affirming the title of the petitioners to the bond, and the money secured by it.

Watkins, the purchaser, relies upon these proceedings as a full defence against the application of the new trustee to resell the land for the payment of the purchase money in case he fails to pay or bring the same into court as prayed by the petition.

The case made by the petition of the new trustee in all its essential features is identical with that of *Iglehart vs. Armiger*, 1 *Bland*, 519, where a similar application made by a trustee to resell land sold under a decree of the court for the payment of the purchase money, on the ground that the equitable lien of the vendor still subsisted was overruled. The doctrine of that case, if sound, (and I certainly approve of it,) is decisive of this, it being there distinctly adjudicated that the equitable lien held by the court for the payment of the purchase money of land sold under its decree, cannot be enforced by a trustee who has assigned the bonds given for its payment, whether the assignment was or was not made with the sanction of the court. That by such assignment the trustee divested himself of all title to come before the court in the capacity of plaintiff, and that the court itself was so entirely without jurisdiction to grant relief in such a case, that even consent would not authorize it to interfere. The remedy of the assignee of the bonds is at law.

There can be no sort of doubt that considering the equitable lien held by the court, the same as if such lien was held by a natural person, and in the opinion of the Chancellor in *Iglehart vs. Armiger*, it has always been so viewed, such lien did not pass to the assignees of the bond in this case. The language of the assignment is such as to forbid it. It is without recourse and brings the case within the express terms of the law of *Schnebley & Lewis vs. Ragan*, 7 *G. & J.*, 120, in which the Court of Appeals decided that such an assignment of a bond given for the purchase money of real estate, "produced an extinguishment of the vendor's lien, because so far as he was concerned it amounted to a payment and satisfaction of his claim." And the same principle was adjudicated by this court in *Dixon vs. Dixon*, 1 *Md. Ch. Decisions*, 220.

Considering the case made by the petition of the trustee in

this case, and exhibited by the proceedings in the cause, covered by the authorities referred to, it must be dismissed.

STOCKETT, for the Petitioner.

McLEAN, for the Purchaser.

ANN HALL ET AL
 VS.
 WILLIAM C. HALL ET AL.

} MARCH TERM, 1852.

[WIFE'S EQUITY—ACT OF 1841, CH. 161.]

THE wife is entitled to a provision out of her estate, when the aid of a court of equity is necessary to enable the husband or his assignees to get possession of it, as a matter *of right*, but the amount is a subject of discretion depending upon the special circumstances of each case.

The act of 1841, ch. 161, protects the interest of the husband in real estate of the wife from *liability* for his debts during the life of the wife, and this protection extends to the proceeds of such estate when sold for the purposes of partition.

[The real estate of Benedict W. Hall, who died in 1843, was sold under the decree in this case, for the purpose of partition amongst his heirs at law. One of those heirs, Jane S. Hall, previous to the death of her father, had intermarried with one William F. Turner, by whom she had issue, and who subsequently, on the 24th of March, 1843, applied for the benefit of the insolvent laws. His trustee in insolvency filed his petition in this case, claiming the value of said Turner's curtesy interest in his wife's share of said real estate, for the benefit of creditors. This application was resisted by Turner and wife, and they pray that, if any relief as sought for by the petitioner be granted, the court will protect the equity of the wife by allowing her, out of the proceeds of sale, such provision for the support of herself and children as justice and equity may require. They further allege in their answer, that they are the parents of nine children, all minors, that the husband is not

possessed of any real estate, and but a small portion of personal property, of small value, and that the wife's interest in her late father's real estate is applied for their benefit and support, and that of their children.

The real estate sold under the decree in this case, amounted to \$21,255, of which the wife of Turner was entitled to one-eighth, after deducting the widow's dower interest. It was admitted, that the whole real estate of which said Benedict W. Hall died seized, was worth about \$65,000 or \$70,000, of which the wife of Turner was entitled to one undivided eighth, subject to the widow's dower. That his personal estate was not more than sufficient to pay his debts. That in 1842, said Turner purchased a tract of land in Harford county, containing about 300 acres, and worth about \$11,000, of which he paid \$8000, the balance, \$3000, still remaining unpaid and a lien on the land, and on the same day conveyed it to said Benedict W. Hall, in trust, for the separate use of Jane S. Turner, his wife, who still holds the same. That the purchase money for this land was given to said Turner by his mother, with the express understanding, that the property to be purchased by him should be conveyed, in trust, for the separate use of his wife and children. That said land is claimed by the creditors of Turner as being chargeable with his debts, and proceedings are pending against the same. That in 1851, a certain David C. Springer sold and conveyed to Jane S. Turner, for her separate use, a farm situate in Harford county, containing about 154 acres, and worth about \$6,500; that of this purchase there has been paid about \$3700, of which \$2250 was the proceeds of certain stocks devised to said Jane S. Turner by her grandmother, to her separate use, and proceeds of a distributive share in a legacy devised to her by her great grandfather, and the remaining \$1500, proceeds of the sale of her father's real estate, and that no portion of this purchase money has been paid by said William F. Turner, who is not possessed of any property, real, personal or mixed, of any but small value, and that the balance of this purchase money is a lien upon the land, and she expects to pay it out of her share of the proceeds of her father's real es-

tate. That said Turner is now 42 years of age, and they have been married about 20 years, the wife being 38 years of age. That they have eight children now living, all under the age of twenty-one, the eldest being seventeen and the youngest about one year old. That said Turner has always been affectionate and attentive to his wife and children; is industrious and attentive in business, and until recently, he resided on the farm which was conveyed in trust for the use of his wife, but now resides on that bought from Springer; that he manages and cultivates the same, and with the proceeds has, in part, supported his family. That the above is all the property belonging to Mr. and Mrs. Turner. That the education of her children and other charges, suitable to the condition in life of her and her family and the style of living to which they have been accustomed, require a strict economy to enable them to live upon the means which they now enjoy, with the aid of said Turner, who is engaged in agricultural pursuits. That the debts which compelled said Turner to apply for the benefit of the insolvent laws, were contracted by him whilst engaged in the fishing business, which proved unprofitable, and that at the time of his application, he gave up all and every description of property possessed by him in his own right, for the benefit of his creditors.

The Chancellor delivered the following opinion upon this petition, answer and above statement of facts.]

THE CHANCELLOR :

The court does not deem it necessary in this case to institute a comparison for the purpose of ascertaining whether the circumstances existing here bring it within the principle settled by the case of *McVey and wife vs. Taylor and others*, recently decided and reported in 3 *Md. Ch. Decisions*, 94.

The principle there decided, being that, when the aid of a court of equity is invoked to enable the husband or the assignee of the husband for value, or by operation of law, to get possession of the wife's property, the court will take care that a suitable provision is made out of the fund for the maintenance of the wife and her children, and that according to circumstances

the whole or a part only, will be settled upon her for that purpose. The fund in that case as in this, consisted of the proceeds of the real estate of the wife sold under a decree of this court, for the purpose of partition among the heirs at law. The parties claiming them were judgment creditors of the husband, who prayed that the equivalent for his curtesy interest in his wife's land might be paid to them, and the question was whether that interest should be taken out of the proportion of the proceeds of the sale assigned by the report of the Auditor to the husband and wife and paid to his creditors. But it was decided that the whole fund being necessary to provide an adequate support for the wife and children, the whole should be devoted to that object, and the decision, it is believed, is fully authorized by the present doctrine of the court upon this subject. It is a question always of course, whether the circumstances justify the application of the principle to the particular case. The wife is entitled to a provision out of her estate when the aid of a court of equity is necessary to enable the husband or his assignee to get possession of it, as a matter of right. It does not rest in the discretion of the court to give or withhold. Her title to a provision is placed by the Court of Appeals in *Duvall vs. The Farmers Bank of Maryland*, 4 G. & J., 282, upon the firm ground of principle, and not upon the shifting and unsatisfactory footing of discretion, which is a foundation far too insecure for so important and useful a doctrine to rest upon. But though the right to a provision rests upon this solid ground, the amount is necessarily a subject of discretion, depending upon the special circumstances of each particular case, as it arises. The object of the rule is to provide a suitable and adequate provision for the wife and children, and to attain this object, when necessary, the court will give her the whole of her property, regarding that object as paramount to the rights of the husband or the husband's creditors.

The circumstances of this case, it has been forcibly urged, distinguish it strongly from that of *Mc Vey and wife vs. Taylor*, and perhaps the points of difference are so marked, that it would not be easy to make the decision in the latter, so far as this particular question is concerned, applicable to the former.

I do not, however, propose to go into this inquiry, nor to express a positive opinion that, standing alone upon the equitable doctrine of the court as established by the adjudged cases, the circumstances of this case are or are not sufficient to justify the giving the whole of this fund to the wife for the maintenance of herself and her children.

The late Benedict W. Hall from whom the estate, which has been sold, descended to his heirs at law, the wife of William F. Turner being one, died in February, 1843, intestate, and consequently after the passage of the act of 1841, ch. 161. That act declares "that no real estate, hereafter acquired by marriage, shall be liable to execution during the life of the wife, for debts due from the husband."

As, therefore, the interest of the husband in this land, was acquired after the passage of this act, it is clear, and has not been denied, that it is protected from execution for debts due from him so long as his wife shall live. And, I do not suppose, that the legislature meant simply to protect it from execution, restricting that term to its technical signification, but they meant, I am persuaded, that during the life of the husband and wife, her lands should not be made liable to pay his debts. Why should it be protected from the execution of his judgment creditors and exposed to be sold by his insolvent trustee after those creditors had forced him to petition, as at the time of the passage of the act they might readily have done by the writ of *ea. sa.*?

Looking to the policy and spirit of the act it would, I think, be falling short of the object which the legislature had in view, to confine its operation within the narrow limits contended for.

But, it is said, that though the act may suspend the right of the creditors of the husband, either by direct execution against the land acquired by the marriage, or through the instrumentality of his trustee, when he petitions for the benefit of the insolvent laws during the life of his wife, provided the nature of the property is not changed, yet if it be changed and converted into money, the property in its new shape is no longer under the protection of the law.

The proposition then is, that though the real estate of the wife may not be liable for the husband's debts during the life of the wife, if for any purpose it becomes necessary to convert that real estate, the protection of the law is withdrawn, and the creditors of the husband, so far as his interest is concerned, may seize upon it. If this be so, it would follow in many cases that the law which was intended to shield the real estate of the wife during her life from the claims of the husband's creditors, would be illusory and ineffectual, as it frequently happens that a sale for the purpose of partition is absolutely necessary, and may be enforced against the consent of the wife, or her interest may be converted into money by proceedings under the act to direct descents whether she consent thereto or not.

In this case the wife is still living, and, therefore, if there had been no sale, the creditors of the husband could not now resort to his interest in her land to pay their claims against him, and as the money, the proceeds of the land, must be regarded as standing in the place of the land, it appears to me, the act of Assembly extends to and protects it.

I cannot bring myself to think, that the legislature intended to restrict the humane provision of the law as has been urged by the counsel for the petitioner. The land of the wife may not only be sold without her consent, when other parties are interested in it as co-heirs, but it is frequently indispensable to the profitable enjoyment of the property that it should be sold, and to say, that in either case, the husband's creditors may at once, and in her life, lay their hands upon the proceeds, or any part of the proceeds, would be to frustrate the plainly indicated policy of the law.

Upon these grounds, then, and without expressing any opinion upon the other questions discussed at the bar, I shall refuse the application of the petitioner, and dismiss his petition, but without costs, as his conduct in bringing the question before the court was judicious and proper.

H. W. WEBSTER, for Petitioner.

OTHO SCOTT, for Respondent.

CATHARINE JAMISON
BY HER NEXT FRIEND

vs.

JOSEPH JAMISON.

}

MARCH TERM, 1847.

[ALIMONY.]

WHERE a separation was commenced and is continued by the act of the husband against the will of the wife, and he refuses or neglects to make provision for her support, the Court of Chancery in this state, has the power, and will decree her alimony, though there has been no divorce decreed and though the case made by the bill and proof would not, according to the ecclesiastical courts in England, entitle her to a divorce *a mensa et thoro*.

In England, alimony is granted only as a consequence or an incident, to a sentence of divorce, *a mensa et thoro*, and no such allowance will be made by the Chancery Court there until such decree of divorce has been passed.

Though in this state the Court of Chancery had no power to decree a divorce prior to the act of 1841, ch. 262, yet it had from a period prior to the revolution, full and complete jurisdiction in cases of alimony, and could, upon a proper case, decree the wife a separate maintenance out of the estate of the husband.

In England on an application for a divorce on account of cruelty, it is necessary to show that actual violence has been committed, attended with danger, or a reasonable apprehension of such violence.

The act of 1777, ch. 12, sec. 14, conferring jurisdiction upon the Chancellor in cases for alimony, gives full and complete jurisdiction over the subject, and does not restrict the court in making such allowance to the circumstances and causes which would entitle the party to a divorce according to the ecclesiastical laws of England.

There is no tribunal in this state competent to entertain a suit for the restoration of conjugal rights.

Prior to the act of 1841, ch. 262, the legislature had the exclusive power of granting divorces, and they exercised it as a regular exertion of legislative power.

There must be some method by which the husband may be compelled to maintain his wife, and when restitution of conjugal rights cannot be decreed, alimony must.

The amount of the allowance is to be determined by the value of the estate of the husband, and if the proof is not sufficiently clear to enable the Chancellor to determine such value satisfactorily, the question will be referred to the Auditor.

[The facts of this case are stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This is a bill filed by the complainant, praying that alimony may be allowed her out of the estate of her husband, the defendant, between whom and herself a separation in fact exists, and has existed since the year 1829.

The bill was filed in 1831, and alleges that for three or four years preceding, the conduct of the defendant towards her had been harsh, unkind and cruel, inconsistent with his duties as a husband and her claims as a wife. That on many occasions he had offered violence to her person, assaulting and beating her in an inhuman manner, notwithstanding she continued to live with him for the sake of her children, hoping that a better spirit would change his heart towards her, and restore her to his kindness and confidence. That the defendant has recently sold all his household furniture, except enough to furnish one room, which he has given to her, which she has at her boarding house, and that the only allowance he makes is barely sufficient to pay her board.

To this bill there was a demurrer, but by the Chancellor's decree of the 17th of January, 1833, the demurrer was overruled, and the defendant ordered to put in a good and sufficient answer, on or before the first day of the ensuing March.

The answer was accordingly filed on that day, in which the allegations of cruelty and ill treatment were denied, and in which, after insisting that the defendant had always desired to live on terms of affection with the complainant, it was averred that the separation was the result of the unreasonable and extravagant conduct of his wife, and her hasty and ungovernable temper, which upon one occasion impelled her to acts of personal violence to his person. That unable to live longer with his wife, he, the defendant, broke up housekeeping, offering at the same time to her that she should select a boarding house suitable to her condition and his means, which, with a proper allowance for her personal expenses, he would pay. That she did select such a boarding house for her accommodation, for which he has since paid at the rate of five dollars per week, a sum believed by him to be ample for the purpose, and more

than his means will justify in view of the demands upon him for the support of his children.

After the filing of this answer no further steps appear to have been taken in the cause until the 28th of July, 1845, when a supplemental bill was filed, in which it was alleged that since the separation, which still continued, the complainant had several times sought a reconciliation, and offered again to live with her husband, but that such, her offers, had been repulsed and rejected by him, and that he has, for a considerable period, failed to supply her with the necessary support and maintenance, thereby rendering her dependent upon the benevolence of friends for subsistence, and that she has understood, and charges, that he has resolved and declared his purpose to withhold from her all support. This bill likewise reiterates the charge in the original bill, that the defendant was endeavoring, by fraudulent conveyances and transfers of his property, to prejudice and anticipate her claims upon him. That the defendant will neither permit her to live with him, nor while apart from him, and kept so apart by his own determination, afford the maintenance which, as her husband, he owes her, and the law exacts from him. This bill concludes with a prayer for alimony and general relief.

The answer was filed to this bill on the 16th of March, 1846, in which all its allegations are roundly denied.

A commission then issued, under which numerous depositions were taken, and much written evidence produced and filed. It may not be considered necessary, and would certainly occupy a great deal of time and space to refer particularly and in detail to this proof. It may be sufficient to say that it does not very clearly appear, which of these two parties was most to blame for the discord which marred their domestic happiness whilst they lived together as man and wife. That there were faults on both sides, and that each occasionally yielded too far to the dominion of temper and the spirit of dissension, seems to be quite apparent from an examination of the proof.

It seems, however, to the court, that three propositions of fact are sufficiently established by the evidence, and it will re-

main to be considered, when they are stated, how far they entitle the complainant to the relief sought by her bill.

The first of these facts is, that the separation of these parties (whatever may have been his motive or provocation) was the act of the defendant, and in opposition to the wish of the complainant.

This fact is established beyond doubt or controversy by the answer of Henry Myers, at page 12, to the 3d interrogatory on the part of the complainant. Mr. Myers states that he was called by defendant as a witness, that he had requested or ordered his wife to leave his house. That he was about to break up housekeeping; that she must select a respectable boarding house, and that he would be responsible for her board. This determination, the witness says, was expressed in a positive and decided manner by the husband, was received by the wife with tears and on her knees, with entreaties that he would not pursue that course, imploring him to try to live together; that she would do all in her power to make his time or life agreeable, and appealing to him on account of their children. These entreaties and propositions he rejected, saying his mind was made up.

As no effort has been made to impeach or contradict this witness, the facts deposed to by him must be regarded as established.

The second fact is, that this separation, as it was originally the act of the defendant, continues now by his will, and against the will and wish of his wife, and in defiance of the desire to return to his society and protection.

This fact, the Chancellor considers as established by the answers of C. C. Jamison and Joseph Jamison to the complainant's 2d interrogatory, and by the answer of T. Wallace Jamison to the fifth interrogatory on the part of the complainant.

The third fact, which may be regarded as proved, is, that since the year 1840, the defendant has discontinued the regular payment of the allowance which he had previously made his wife, having since then only paid her some inconsiderable sum of money.

The answer of T. Wallace Jamison to the 12th interrogatory, together with complainant's receipts, none of which appear to be dated since 1840, appear to establish this fact.

The question then arises upon these pleadings and facts, whether there exists in the Court of Chancery of Maryland, authority, during the separation, to make a suitable allowance out of the property of the husband for the maintenance of the wife, or in other words to decree her alimony?

It is a question of great importance and delicacy, and has commanded, as it deserved, a very full and deliberate consideration of the cases upon the subject which have fallen under my observation, or been brought to my attention in the arguments of the counsel by whom the cause has been tried.

The counsel for the defendant has insisted that in England, the Court of Chancery grants alimony, or a separate maintenance for the wife, only, as a consequence of, or as an incident to, a sentence of divorce, *a mensa et thoro*, and that therefore no such allowance can be made there by the Chancery Court until the proper tribunal shall have paved the way by decreeing a separation between the parties, and this is a proposition which seems to be settled by the cases.

In this state, no judicial tribunal was ever clothed with authority to grant divorces until the legislature, by the act of 1841, ch. 262, conferred jurisdiction in such cases upon the courts of equity, defining the ground upon which they should proceed in the exercise of this new jurisdiction. Up to that period the legislature itself had exercised this power.

But although the Court of Chancery, until the passage of this act, had no authority to decree a divorce, it had from a period prior to the revolution full and complete jurisdiction in cases of alimony, and could decree to the wife a separate maintenance out of the estate of the husband, founded upon a proper case, 2 *Bland*, 565, 566; and the cases cited in the notes. *Galwith vs. Galwith*, 4 *H. & McH.*, 477: *Crane vs. Meginnis*, 1 *G. & J.*, 475.

This jurisdiction has also been expressly given to the Court of Chancery by the act passed at the February session, 1777,

ch. 22, sec. 14, which declares, "that the Chancellor shall and may hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there."

It is said, however, that although the Court of Chancery may possibly entertain applications for alimony under the power communicated to it by this act, although a sentence of divorce, *a mensa et thoro*, may not previously have passed, yet still no such application can be successful unless upon grounds which in England would entitle the parties to such a divorce in the ecclesiastical court there, and such is the opinion of the late Chancellor as expressed in the case of *Helms vs. Francisus*, 2 *Bland*, 568.

And the argument is then pressed, that the case made by these proceedings would not, according to the doctrine of the ecclesiastical courts in England, entitle this complainant to a divorce, *a mensa et thoro*, and that consequently the prayer for alimony must fail. The doctrine upon this subject in the ecclesiastical courts certainly appears to be, that in applications for a divorce on account of cruelty it is necessary to show, "that actual violence has been committed, attended with danger, or a reasonable apprehension of such violence." *Evans vs. Evans*, 4 *Eng. Eccl. Rep.*, 310; *Lockwood vs. Lockwood*, 7 *ib.*, 115.

It is said, then, that though the Court of Chancery in Maryland had not, prior to the act of 1841, jurisdiction in cases of divorce, and though the authority to determine causes for alimony was expressly delegated to this court by the act of 1777, that yet in the exercise of this jurisdiction it must be governed by the principles which regulate the English ecclesiastical courts in passing sentences of divorce; that is to say, that no decree for alimony can be passed by this court, except for causes which in England would entitle the wife to a divorce, *a mensa et thoro*, and as the circumstances of this case would not entitle the present complainant to a decree of separation from her husband, she cannot have alimony or a separate maintenance.

This argument is founded upon the construction placed by

the defendant's counsel upon the 14th section of the act of February session, 1777, ch. 12, the language of which has been already cited. The Chancellor does not concur in this construction of the law. It gives to the Chancellor power "to hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts there." It therefore gives full and complete jurisdiction over the subject of cases for alimony, but there is nothing in the language employed in the section which necessarily restricts the court to the circumstances and causes which would entitle the party applying for alimony to a divorce according to the ecclesiastical law of England. The Chancellor is to hear and determine causes for alimony as fully, and with as much authority as similar causes are heard in the ecclesiastical courts, but it does not follow that in granting relief he is confined to the same grounds which must be shown in those courts to entitle the wife to a divorce, *a mensa et thoro*. If, indeed, the court can only decree alimony where a similar decree can be obtained in the ecclesiastical courts, or the English chancery, and it can only be obtained there as a consequence of a divorce, *a mensa et thoro*, then no decree for alimony could ever have been passed in Maryland from the passage of the act of 1777 to the act of 1841, unless the legislature had previously divorced the parties. The Chancellor thinks that such cannot be the true construction of the act of 1777. If it is, then, in every bill for alimony it should have been averred to give the court jurisdiction that the legislature had previously separated the parties, and yet it is believed such averment has not been introduced, or considered necessary. It is certain no such averment is to be found in the bill in this case, which has been ruled sufficient upon demurrer.

Supposing, then, that a preliminary act divorcing these parties, *a mensa et thoro*, was not necessary to give the court jurisdiction to decree the wife alimony, the question remains whether the facts which the Chancellor considers established in this case entitle her to that relief? These facts are separation,

commenced and continued by the act of the defendant against the will of the wife, and the refusal or neglect of the former to make provision for her support.

There can be no sort of doubt that it is the duty of the husband to provide a suitable maintenance for his wife, and that if he will not do so some proper remedy should be provided to compel him. It is true that an action may be brought against the husband in a court of common law by any person who may supply the wife with necessities under such circumstances, according to her rank and condition, but this is at best but a precarious and uncertain reliance, and persons may not be found who are willing to trust the contingencies and delay which may be interposed to prevent recoveries in such cases. It would be far better if some proceeding could be instituted by which the husband shall be compelled to pay alimony, or that the wife shall be restored to her conjugal rights. But in this state there is no tribunal competent to entertain a suit for the restoration of conjugal rights, and hence the only alternative is to leave the wife, in case the husband refuses to provide a suitable maintenance for her, to be supplied by strangers who may be willing to look to the husband for their reimbursement, or to grant her alimony out of his estate.

It has been already remarked that in Maryland a previous decree divorcing the parties, *a mensa et thoro*, is not indispensable to the granting the wife alimony out of the property of the husband. In *Wallingsford vs. Wallingsford*, 6 H. & J., 485, the Court of Appeals said, that "alimony is a maintenance afforded to the wife where the husband refuses to give it, or where from his improper conduct he compels her to separate from him," and that it is "a provision for her support to continue during their joint lives, or so long as they live separate." According to the pleadings and proceedings in that case there had been no divorce, and it is nowhere intimated that such was a necessary prerequisite to the allowance of alimony. So far from it the prayer of the petition which asked for alimony, the court say cannot be granted because the record did not show the value of the property of the husband, the *data* by which the amount

of the allowance should be regulated. The decree which was passed in that case, and which gave relief of a totally different character from that which was asked for, was reversed for the reasons stated, but without prejudice to the rights of the parties. It seems to the Chancellor fair to suppose that if in that case the value of the husband's property had been shown, the Court of Appeals, upon the principles stated by them, would have given the wife alimony though there was no pretence that they had been divorced previously. The Chancellor does not think that there is anything in the case of *Crane vs. Meginnis*, 1 *G. & J.*, 463, which is in conflict with his understanding of the previous case of *Wallingsford vs. Wallingsford*. The judge in delivering the opinion of the court in *Crane vs. Meginnis*, speaking of the doctrine of the ecclesiastical courts in England, says that the allowance of alimony there is treated as a consequence drawn from the divorce, *a mensa et thoro*, but it certainly is not to be inferred from this that he meant to say the Court of Chancery of Maryland could not decree alimony unless the parties had been previously divorced, when no judicial power in the state at that time had authority to pass such a sentence.

Prior to the act of 1841, ch. 262, the act of divorcing man and wife had been performed exclusively by the legislature, and as said by the Court of Appeals in *Crane vs. Meginnis*, could be viewed in no other light than the regular exertion of legislative power.

Upon what grounds this department of the government proceeded in this exercise of its authority it would be difficult to ascertain, as the laws passed upon this subject seldom contain a preamble or other statement setting forth the facts which led to their enactment, but it is certainly highly probable that they did not in all cases confine themselves to the causes upon which alone the ecclesiastical courts in England would separate man and wife. It is certain that the act of 1841 conferring jurisdiction upon the equity courts authorizes them to grant divorces both absolute and qualified upon grounds which are not warranted by the canon law of England.

It is not the design of the court at this time to place a construction upon this law, because as the original bill was filed before its passage, he does not think its provisions are applicable to the case made by it, and because neither it nor the supplemental bill prays for a divorce of either kind. The bill prays specifically for alimony, and the question is, whether this court has the power and ought, under these circumstances, decree it to her.

The Chancellor thinks the power exists, and that the facts of the case call imperatively for its exertion. This conclusion though not fortified by any direct Maryland decision upon the point, is not without authority in support of it. In *Rhame vs. Rhame*, 1 *McCord's Ch. Rep.*, 197, the Court of Appeals of South Carolina in reversing the decree of the Chancellor, say, at page 207, "that desertion or abandonment of the wife by the husband would be good ground for alimony contrary to the English rule." "That there must be some method by which the husband may be compelled to maintain his wife, and when restitution of conjugal rights cannot be decreed, alimony must."

My impression is, that this is the true rule, and I shall decree accordingly, but the proof in the record in regard to the value of the estate of the husband is not so clear as to enable me to determine satisfactorily the amount of the allowance to be made to the wife, and the case will, therefore, be sent to the Auditor to make a report upon the subject from the proofs already taken and such further evidence as the parties may lay before him. The propriety of referring the question to the Auditor under the circumstances of this case, is stated by Chancellor Kent in *Barrere vs. Barrere*, 4 *Johns. Ch. Rep.*, 198.

[An order was then passed directing the Auditor to state the value of defendant's property at the present time, and also at the time of filing the bill, in accordance with the above opinion. After this report was made by the Auditor, but before the Chancellor acted upon it, the defendant died, and by consent of his executor and the complainant, a decree was passed directing the executor to pay complainant all her costs and expenses,

including counsel fees to the amount of \$300, and dismissing the bill.]

WM. J. WARD and CHAS. F. MAYER, for Complainant.
R. W. GILL, for Defendant.

JOSEPH J. SPEED, TRUSTEE,
vs.
THOMAS SMITH AND EDWARD BOYLE. } SEPTEMBER TERM, 1851.

[EXCEPTIONS TO TRUSTEE'S SALE.]

THE omission to make a prior incumbrancer a party, though it might possibly be error, for which the decree would be reversed on appeal, will not render the sale void.

A mortgage was executed by an insolvent, and his trustee, nearly twelve years after, petitioned for the benefit of the insolvent laws, upon which a decree for the sale of the mortgaged premises was passed. **HELD—**

That an objection to the sale upon the ground of the incapacity of the mortgagors to execute the mortgage cannot be sustained, the presumption being after such lapse of time and in the absence of proof to the contrary, that no debts due by the insolvent, *at the time* of his application, remain unpaid.

In the absence of any misleading representation by the trustee of the condition and value of the property, an objection by the purchaser that it sold for more than its worth, cannot be sustained, the property having been open to his examination.

If the trustee makes any promise or representation to the bidders, that the estate shall be, or is, clear of all incumbrances, or that the title is better or different from that which would flow from the proceedings, which promise or representation cannot be complied with, or turns out to be erroneous, the sale will be set aside.

The advertisement stated that property sold was subject to a ground rent of "only ten dollars." The exceptant offered in evidence a lease of property of which that sold was a part, executed in 1796, for the yearly ground rent of twenty dollars. Several subsequent conveyances of the property sold were shown and that the ground rent paid upon it had been \$10, and no proof was offered that this particular property had, since the lease, been held liable to the rent of \$20 therein reserved. **HELD—**

That an objection to the sale on this ground could not be sustained, the Chancellor being of opinion, that there had been an apportionment of the original ground rent acquiesced in by those who claim under the original lease.

The trustee stated, at the sale, that there were claims against the property, but that he would retain a sufficient amount of the purchase money to pay them, and that the purchaser would get a good title, which statement the purchaser heard. **HELD—**

That the pendency of a suit to foreclose a prior mortgage on the property was no sufficient ground to set the sale aside, but the court will see that the offer of the trustee to clear up the title is performed, and that a sufficient amount is retained out of the proceeds of sale for that purpose.

The court, in all sales under its decrees, is itself the vendor, acting through the instrumentality of its trustee or agent, for the benefit of the parties concerned.

A sale is not void because the trustee may have omitted to give bond as required by the decree before it was made.

A private sale, if decreed advantageous, may be ratified by the court, though the trustee was directed by the decree to sell at public sale.

[The exceptions to the sale made in this case referred to in the Chancellor's opinion were taken by the purchaser, and are in substance as follows :

1st. That the property was offered upon the terms set forth in the advertisements by J. J. Speed, who in one advertisement professed to act as trustee under the decree of this court, and in the other as trustee under a deed of trust; and said trustee stated in said advertisements that the ground rent is *only* ten dollars, whereas exceptant has since the sale discovered that it is subject to a much larger ground rent, of which he immediately notified the trustee, and that he would not on that account take the property.

2d. Because it was alleged at the sale that a good title would be given to the purchaser, who would take the property free from all incumbrances, whereas exceptant has ascertained since the sale that it is not so free, and that a good title thereto cannot be given by the trustee.

3d. That exceptant when he bid for the property knew nothing about the title to it, and relied upon the representations then made, but as soon as he ascertained the difficulties of the same, he notified the trustee that he would not comply with the terms of sale. That since the sale he has learnt that the decree in this case was rendered upon a mortgage given by Thomas Smith, who had previously applied for the benefit of the insolvent laws, and by Edward Boyle, who was his permanent trustee, and he has been advised that a mortgage such as this and a decree founded thereon, is binding only upon said Smith and Boyle in their individual capacities, and does not bind the

creditors of Smith prior to his application, and he alleges that there are such creditors not paid, and therefore the trustee cannot pass a valid title free from all incumbrances, such as he professed to pass when he made the sale.

4th. That Smith having applied for the benefit of the insolvent laws, could not as against his creditors make a valid and legal mortgage, and Boyle as his trustee, was not authorized to unite therein, and his so doing had no legal effect, and therefore the mortgage and proceedings in the cause did not authorize the trustee to pass a valid and binding title to the property such as he professed to pass when he offered the same for sale.

5th. That the proper parties were not made in this cause.

6th. That since the sale exceptant has become informed of the following circumstances, of which he was altogether ignorant when he made the purchase. That Smith applied for the benefit of the insolvent laws in 1836, and that Boyle was duly appointed his permanent trustee. That on the 1st of December, 1841, Smith executed a mortgage to one John N. Smith, to secure the sum of \$1526, and that subsequently on the 24th of December, 1848, the mortgage on which the decree was passed was executed by Smith and Boyle to Speed. That on the 17th of November, 1849, a bill was filed in Baltimore County Court, as a court of equity, by the administrator of John N. Smith, against said Thomas Smith and Speed, to foreclose said mortgage of the 1st of December, 1841, and to sell the property. That said Smith and Speed appeared to said case, and that the proceedings therein are still pending and unsettled, and said Speed, notwithstanding the pendency of said proceedings, offered the property for sale in manner and form hereinbefore mentioned, and this exceptant had no knowledge of the same at the time of the said sale.

7th. That Speed, when he offered the property for sale, in fact offered it under a deed of trust, which he alleged had been given him by Smith, as well as under the decree in this case, but that these facts are not set forth in the report of sale made by the trustee, and that said report is also informal and imper-

fect in that it contains no sufficient description of the property therein reported to have been sold.

8th. That when exceptant was informed by his counsel that Speed derived his power to sell from an insolvent debtor and his permanent trustee, and in a case where there was an outstanding mortgage in dispute and unsettled, and where the ground rent was greater than it was represented to be, he at once declined to take the property unless all incumbrances were immediately removed and a good and valid title made, which could only be done by obtaining a release of said mortgage, and of the ground rent above ten dollars, and a confirmatory deed from all the creditors of Smith; and at once notified the trustee that he was not bound to take the property, and would do so only in case the terms of sale were immediately complied with, and he therefore protests that he is not bound to take it, and is entitled to be released from his purchase.

An additional exception was filed at the hearing; that the trustee did not file a bond with approved security as trustee before offering the property for sale, and that no bond has heretofore been filed in the case, and the trustee not having given bond, as required by the decree, was not authorized to make a sale, and upon this ground he prays that the sale may not be finally ratified.

The other facts and proceedings in the case are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR :

This case has been brought before the court, and has been argued by counsel, orally and in writing, upon exceptions to the sale reported by the trustee on the 16th of July last.

It appears by the proceedings, that on the 24th of April, 1848, Thomas Smith and Edward Boyle, the latter being the duly appointed and qualified permanent trustee in insolvency of the former, conveyed to the complainant, Speed, a parcel of leasehold property, in the city of Baltimore, to secure the payment of the sum of one thousand dollars loaned by him to the mortgagors, together with the interest thereon, in one year

from the date thereof. The property, as described in the mortgage, is therein stated to be subject to the payment of a ground rent of ten dollars per annum, and the mortgage being executed in pursuance of the provisions of the act of 1833, ch. 181, an application was made to the court, as authorized by said act, on the 5th of May following, for a sale of said property, in case the debt, with the interest thereon, should not be paid according to the stipulations of the mortgage, and a decree for that purpose passed on the same day, authorizing a sale of the mortgaged premises when the time limited for the payment of the money should have elapsed.

The money not being paid, the trustee named in the decree advertised the property for sale, and on the 12th of July last, the same was sold at public auction, to the exceptant, William Wylie, for the sum of \$5,300, and the sale reported on the 16th day of the same month.

The proceedings further show that Thomas Smith, one of the mortgagors, had applied for the benefit of the insolvent laws on or about the 7th of December, 1836, and that Boyle, who was appointed his permanent trustee, reported to Baltimore County Court, on the 28th of September, 1849, that for the purpose of closing his trust, he had sold the surplus property on hand, including the premises in the proceedings in this cause mentioned, to said Smith, which sale was confirmed by said court on the 13th of November following, and the consideration money being paid by G. Smith, Boyle, on the 26th day of the same month and year, conveyed the property to him, and that on the same day Smith conveyed the same to Speed, the complainant in this cause, and the trustee appointed by the decree of this court, in trust, with power to sell for the purposes in the said deed mentioned.

The complainant thus filling the double capacity of trustee of this court and trustee under the deed to him from Smith, advertised the property in both capacities, and in his capacity of conventional trustee, declared the property would be sold free from all incumbrances, as appears by a copy of the printed advertisement, to be found among the proceedings in this cause.

Prior, however, to the mortgage from Smith and Boyle, to the complainant, that is to say, on the 1st of December, 1841, the former had conveyed the same parcel of property to one John N. Smith, by way of mortgage, to secure the payment of the sum of \$1,526, upon which mortgage Bolivar B. Daniels, as administrator of the mortgage, filed a bill on the equity side of Baltimore County Court, against the mortgagor, and Speed, the complainant in this cause, which bill has been answered, and the claims being contested, the cause is still depending in that court.

On the day of the sale, the purchaser, Mr. Wylie, signed a paper, acknowledging himself to be the purchaser for the sum mentioned in the report of the trustee, and promising to comply with the terms of sale, but as appears by a memorandum on the same paper, within a few days thereafter he notified the trustee of his objections to the title.

The objections which are now urged to the ratification of the sale, which relate to the form of the proceedings under which the decree was obtained, are not, in my judgment, tenable.

The act of Assembly under which the mortgage was given and the application made to the court for a decree upon it, contemplates, only an *ex parte* proceeding, and indeed, if it were otherwise, the omission to make a prior incumbrancer a party, though it might possibly be error, for which the decree would be reversed on appeal, is unquestionably not sufficient ground for treating the proceedings as a nullity and the sale void.

I also regard the objections to the mortgage upon which the decree passed upon the ground of the incapacity of the mortgagors to execute such an instrument as invalid. That mortgage was executed by the insolvent and his permanent trustee nearly twelve years after the former petitioned for the benefit of the insolvent laws, and therefore, in the absence of proof that any of the debts due by the insolvent at the time he petitioned, remain unpaid, it may reasonably be presumed that none such exist. And this presumption is strongly fortified by the two deeds of the 26th of November, 1849, the one from Boyle, the trustee, to Smith, and the latter from Smith to Speed.

I likewise attach no weight to the objection that the property sold for more than it was worth. In the first place, it appears that the bid of the exceptant only exceeded, by a small amount, what was offered by other bidders, and in the next, the property was open to the examination of the purchaser, and it was his own fault if he did not fully acquaint himself with its value. There is no pretence that any misleading representation was made to the trustee in regard to the condition or value of the property.

The objections affecting the title remain to be considered.

Whether it be the settled law of this court, as was said by the late Chancellor, in the case of *Anderson vs. Foulke*, 2 *H. & G.*, 358, that "to all judicial sales under its orders or decrees the rule *caveat emptor* applies," and that in all such cases the right and title of the parties to the suit, and nothing more, is sold, need not now be investigated, though it may be remarked that the rule *caveat emptor* is certainly subject to some modification, as appears by what fell from the Court of Appeals in the case of *Glenn vs. Clapp*, 11 *G. & J.*, 10. It is not necessary to express any opinion upon the point now, because it is supposed to be very clear that if the trustee makes any promise or representation to the bidders, that the estate shall be, or is, clear of all incumbrances, or that the title is better or different from that which would flow from the proceedings, and the promise or representation cannot be complied with, or turns out to be erroneous, the sale will be set aside. And the question, therefore, in this case, is, whether the promise or representations alleged to have been made by the trustees under this decree is of such a character as upon the facts and circumstances disclosed by the evidence will vitiate this sale?

The first objection, founded upon the charge that an erroneous representation was made by the trustee in relation to the incumbrances to which the property is subject, is, that the advertisement stated that the ground rent was only ten dollars. It appears by a copy of the lease filed in the cause, that the property of which the premises in question is a part, was leased by the late John E. Howard to Joseph Osborne on the 19th of

March, 1796, for ninety-nine years, renewable forever, at and for the yearly rent of twenty dollars. And that the property mentioned in the proceedings in this cause being a part of the premises contained in the lease from the said Howard to Osborne, was, on the 20th of August, 1830, conveyed by Rosannah Kilbreath, administratrix of Thomas Kilbreath, to Thomas Smith for the sum of \$2,155, with like liberty of renewal, subject to a ground rent of ten dollars. It appears by the recitals in this deed, that the sale was made by order of the Orphans Court, and that the property had been conveyed to one Thomas Hicks, and by the latter to Thomas Kilbreath, by whose administratrix it was conveyed to Thomas Smith.

There is nothing to show how the title to the ground rent passed from Howard, the lessor, but a witness by the name of S. G. Shipley, was examined, who says he is and has been the owner of the rent for six or seven years, and bills are exhibited made out in his name, with his receipts attached, charging ten dollars a year rent, for the years 1850 and 1851, which the receipts show were paid by the trustee Speed. The evidence of Shipley is excepted to, and it appears to me the best evidence of his being the owner of the rent, would be the deed under which he claims, and that his parol evidence is, therefore, objectionable, but seeing that the lease from Howard is upwards of fifty-six years old, and that no proof has been produced to show that this particular parcel of property is now held liable for the rent of \$20 reserved by that lease, I cannot think it would be proper to conclude that it is so liable. The burden of proof is upon the exceptant, and I am by no means prepared to say, he has made his case out simply by the adduction of a lease executed more than half a century ago, without any proof whatever that the rent reserved by the lease has been exacted from the owner of this particular parcel. On the contrary, I am of opinion, upon the proof now before me, that there has been an apportionment of the original ground rent between the two lots into which the property embraced in the lease from Mr. Howard has been divided, and that by this apportionment the premises mentioned in the proceedings in this cause have been

subjected to the payment of ten dollars only, and that this division of the incumbrance has been acquiesced in by those who claim under the original lessor.

The remaining objection to the title rests upon the mortgage given by Thomas Smith to John N. Smith for \$1526, on the 1st of December, 1841. Prior to the execution of this mortgage, that is, in December, 1836, Smith, the mortgagor, had applied for the benefit of the insolvent laws, and Edward Boyle was his permanent trustee, and at the date of the mortgage, Boyle had not reconveyed the mortgaged premises to Smith. It may be well questioned, therefore, whether Thomas Smith, at the date of his mortgage to John N. Smith, had any title to convey. But a bill upon this mortgage has been filed, and is now depending in Baltimore County Court, and the existence of this suit is urged as constituting a valid objection to the sale.

The trustee, in his advertisement of the property under the authority of the decree of this court, says nothing about the title except that the ground rent is only ten dollars, but in his advertisement under the deed from Smith to him, he says the sale is made "free from all incumbrances," and it is alleged that the mortgage to John N. Smith, and the suit upon it in Baltimore County Court, constitutes an incumbrance which shows the representation to be inaccurate, and relieves the purchaser from the obligation to complete the purchase.

Without stopping to inquire how far a sale made by a trustee appointed by a decree of this court, can be affected by representations made by the same person acting in a different capacity, it remains to be seen whether the purchaser was not, or might not, have been informed prior to the sale, of the existence of claims against, or incumbrances upon this property.

There can be no doubt, I think, from the proof, that on the day of sale, and before the bidding commenced, Mr. Speed, the trustee, announced publicly, that the taxes and ground rents would be paid to the day of sale, and that there were claims or a claim against the property, but that a sufficient amount of the purchase money would be retained by the trustee to pay the claims, and that the purchaser would get a good title.

It is true, some of the witnesses say, they did not hear Mr. Speed make this declaration, but that he did make it, and that publicly, it is impossible to doubt, and there is no reason to doubt that he was heard by the purchaser. The trustee may not, and I presume did not, say any thing about a chancery suit, but it seems to me, when he spoke of claims against the property which he would retain money in his hands to pay, he said enough to put bidders on inquiry, and if they neglected to make the inquiry, they cannot, for that reason, escape the obligation of their contract and avoid the sale.

But as the declaration was made, and the offer to clear up the title is an important stipulation in the contract, this court will see that it is performed, and that there is retained of the proceeds of the sale a sufficient amount for that purpose, and as it is clear that the money arising from the sale made by the trustee is abundantly adequate, to remove the incumbrance, there are no grounds for apprehending that the title of the purchaser may not be perfected.

I do not, therefore, see, in the existence of the mortgage to John N. Smith, and the pendency of the bill upon it in Baltimore County Court, an adequate reason for refusing to ratify the sale reported in this case. There is certainly no sufficient ground for supposing that the agreement of the trustee to remove incumbrances from the property may not be performed, and, if that is done, the purchaser has no cause for complaint.

The exceptions of the purchaser to the ratification of the sale, were filed on the 2d of September last, and by an order passed on the day following, they were to have been heard on the 10th of the then ensuing month of October, upon notice as usual to the trustee, but the parties afterwards, by an agreement filed on the 20th of the same month, postponed the hearing until the 28th, and it was submitted on that day, upon a written argument on the part of the plaintiff, and an oral one on the part of the purchaser. And on the same day the purchaser interposed an additional exception, upon the ground that the trustee had omitted to give bond conditioned for the faithful performance of his trust prior to the sale, or at this period, and that there is no such bond now among the proceedings.

The trustee, in reply to this exception, has filed a petition, verified by his affidavit, in which he says he did give such bond, and supposes it has been lost or mislaid, and proposing now to give a new bond, which shall be received *nunc pro tunc*.

It is by no means a clear proposition that a sale made by a trustee, acting under the authority of a decree of this court is void because the trustee omitted to give bond prior to the sale, as required by the decree, and it may, perhaps, be well doubted whether the purchaser, who is not bound to see to the application of the purchase money, can urge such omission as a ground of objection to the sale.

It is the established doctrine of the court, that in all sales under its decrees, the court itself is the vendor, acting through the instrumentality of its trustee or agent, for the benefit of the parties concerned. *Iglehart vs. Armiger*, 1 *Bland*, 527; *Glenn vs. Clapp*, 11 *G. & J.*, 8. The trustee reports the offer of the bidder to the court and its order ratifying the sale, completes the contract. It is believed the case of *Winchester, trustee of Williams vs. The Union Bank*, 2 *G. & J.*, 73, and the other cases founded upon our insolvent laws, do not apply to the case now under consideration. The doctrine settled by those cases is, that a trustee of an insolvent debtor cannot act in that capacity at all, until he has given bond and security, without which he is not invested with the character and rights of a trustee in any respect or to any extent. But when this court appoints by its decree, its trustee or agent to sell property, and requires him to give bond for the faithful performance of his duty, no reason is apparent why, if it thinks fit, it may not ratify a sale made by such trustee, even though he omits to give bond, the order of ratification being equivalent to a previous delegation of the power to sell. That the trustee may deviate from the terms of sale prescribed by the decree, and that a private sale may be ratified by the court, though the trustee is directed to sell at public sale, if the sale itself is advantageous, is conclusively settled. *Glenn vs. Clapp*, 11 *G. & J.*, 8. And it would be difficult to assign a reason why the court, the actual vendor, may not confirm a sale though its agent, the trustee, has

not obeyed its direction in giving the bond required by the decree.

But in this case, I shall not pass a final order ratifying the sale, until the trustee shall have given the requisite bond, because I do not now propose to say that the bond may be dispensed with altogether. All that I now design to decide is, that the sale is not void, because the trustee may have omitted to give bond before it was made, but I will require him to give it before finally ratifying the sale, that the parties entitled to the money may have the security, which the decree intended they should have, for its proper application.

Since the foregoing was written, the trustee has filed a bond, which has been approved, and an order will, therefore, be passed ratifying the sale.

ALEXANDER and GILL, for Exceptants.

J. J. SPEED, for the other Parties.

HORACE ABBOTT AND OTHERS vs. THE BALTIMORE AND RAPPAHANNOCK STEAM PACKET CO. AND OTHERS.	}	MARCH TERM, 1847.
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[COMMISSIONS TO RECEIVERS—SUBSTITUTION—PRACTICE.]

It has not been the uniform practice of the court to allow receivers of insolvent corporations and private partnerships a commission of eight per cent. but the allowance in such cases has been controlled by the circumstances of each case rather than by any fixed, invariable principle or analogy.

As a general rule governing all cases not attended with peculiar circumstances requiring an augmentation, the allowance to receivers of insolvent corporations or private partnerships will be regulated by the general rule allowing commissions to trustees.

The clerk of a steamboat has a lien upon the vessel for his claim for wages, and stands in that respect upon an equal footing with the crew.

The captain of a steamboat drew an order upon the company, upon which the clerk advanced the money and applied it to pay the crew. **HELD**—That this order operated as an assignment of so much of the fund out of which

the crew were to be paid, and substituted the clerk in the place of the crew and entitled him to their rights as their assignee.

Where a creditor omitted to furnish proof of his claim in due time, having acted upon information derived from the receiver that his claim would be allowed, and the fund was still under the control of the court, it was HELD—That he should be allowed to prove his claim and receive his proportion of the dividends.

It is the duty of this court if suitors are misled by its agents, however innocently, to repair the injury if it can be done without prejudice to the ascertained rights of others.

[The facts of this case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR :

In this case a bill was filed by the complainants on the 13th of October last, alleging and showing themselves to be creditors of the Baltimore and Rappahannock Steam Packet Company, charging the said company to be insolvent, and upon that and other grounds praying for an injunction against them, and other parties associated with them, prohibiting certain acts complained of, and for the appointment of a receiver to take possession of the property and effects of the corporation, and to dispose thereof subject to the orders of the court.

The injunction was ordered on the filing of the bill, and the same order directed that a receiver would be appointed, with or without answer, unless good cause to the contrary should be shown by a day limited for that purpose upon service of a copy of the order and bill on the adverse parties.

On the 1st of January, 1847, the answers of some of the defendants having been filed, an order was passed appointing a receiver, with power to take possession of and hold the property subject to the order of the court, and subsequently on the 4th of January, 1847, with the written consent of the parties filed in the cause, the receiver was authorized to make sale of the property upon certain specified terms at public sale, and by the same order was directed to notify the creditors of the corporation to file their claims in the Court of Chancery within two weeks from the day of sale.

Under this order the receiver made sale of the property in

his possession on the 2d of February last, amounting to upwards of twenty-six thousand dollars, and this sale being reported, the proceedings are now laid before the Chancellor for an immediate ratification thereof, to which the parties interested give their assent.

There would, therefore, be no difficulty in passing the usual order of ratification, but for a suggestion which created some doubt in the mind of the court as to the rate of the commission which should be allowed the receiver upon the proceeds of these sales. It has been suggested by counsel of the highest respectability and extensive practice in the court, that eight *per centum* is the usual allowance to receivers of insolvent corporations or private partnerships in analogy to the allowance to trustees of insolvent debtors under the act of 1805, ch. 110, sec. 10, and that the late Chancellor, proceeding upon that analogy, had fixed the commission accordingly in all such cases.

Supposing that the office, responsibilities and duties of a receiver are strictly analogous to those of the trustee of an insolvent debtor, it would not follow that the commission would in all cases be eight *per cent.*, because that rate is the *maximum* allowed by the act to such trustees, which, therefore, though it cannot be exceeded, may be reduced by the court.

In consequence, however, of the suggestion above mentioned, the Chancellor has considered it proper, by an examination of some of the cases passed upon by his predecessor, to ascertain how far any rule upon the subject has been established, and the result is, as he understands the cases, that the amount of compensation allowed to receivers has been controlled by circumstances rather than by any fixed, invariable principle, or analogy.

In *Williamson vs. Williamson*, 1 *Bland*, 418, which was the case of an insolvent partnership, decided in 1826, the allowance to the receiver was eight *per centum*, but as said by the Chancellor at page 428, the compensation was determined on a representation of his trouble, skill, and merits, as to which the parties were entitled to be heard. The allowance, therefore, in this case was not in conformity with any established rule.

In the manuscript case of *Fell vs. Doyle*, in 1831, which

likewise was the case of an insolvent partnership, the Chancellor in May, 1832, ratified the report of the Auditor, allowing the receiver five *per centum* of the proceeds of the sales.

By an order passed on the 22d of May, 1844, in the case of *Landstreet vs. the Shot Tower Company of Baltimore and others*, the Chancellor, upon the petition of certain trustees, appointed by deed for the benefit of the creditors of the company, allowed to them and their successor eight *per cent.* upon all sums actually collected and disbursed by them. The Chancellor, in the order in question, considered that case as analogous to one arising under the insolvent laws, and granted the commission expressly in consideration of the *great trouble* the trustees had. This it will appear was not the case of an allowance to a receiver but trustees, and might be urged, therefore, as a precedent for allowing them in all cases of insolvent corporations or partnerships the same rate of commission. It is, however, manifest, as it seems to me, that the allowance was not made so much in deference to the analogy referred to as in consideration of the great trouble which the trustees had encountered, which, according to the standing order of the court, would have entitled them to a compensation exceeding the scale fixed by that order. This case, therefore, cannot be understood as establishing a rule applicable to the proper allowance of commissions to receivers, and distinguishing between them and trustees. It was the case of trustees, and the analogy to the insolvent system spoken of by the Chancellor, must, therefore, be regarded as applying to them, and would in all cases entitle them to a commission of eight *per cent.*, if the rule suggested is to be considered as the established rule of this court.

In the case of *White vs. White*, in 1844, which was the case of a partnership, and in which receivers were appointed, they were allowed a commission of eight *per cent.* upon the *rents and profits*, and upon the proceeds of sales according to the usual chancery scale upon sales made under its decrees and orders. In the case of *White vs. White*, the Auditor's report in which the above allowance was made was ratified on the 20th of December, 1844, though by an order passed upon the 2d of

the same month, the receivers were allowed a commission of eight *per cent.* on the sums received and disbursed by them. As however the actual allowance was eight *per cent.* on the rents and profits, and according to the usual chancery scale on the sales, the opinion of the Chancellor upon the subject must have undergone some change between the dates of his two orders.

The Chancellor, therefore, is not satisfied that it is the uniform practice of the court to allow receivers of insolvent corporations or private partnerships a commission of eight *per cent.*, but if it were otherwise, he would feel unwilling to fix that rate of commission in this case, as the insolvency of the company, though averred in the bill, is explicitly denied by the answers, and cannot, therefore, now be assumed to exist.

Upon consulting the books of practice it will be found that no uniform, invariable rate of allowance prevails in England, but that each case depends upon its own circumstances, and according to the degree of difficulty, or facility experienced by the receiver, the compensation is diminished or increased. *Daniell's Ch. Pr.*, 1985, 1986.

It would certainly be a great convenience to the court, and perhaps on other accounts desirable, that some scale of compensation should be established which shall govern all cases not attended by peculiar circumstances, and for that reason entitled to an augmentation of the allowance.

The Chancellor thinks that the standing order passed at March term, 1817, regulating the commissions to be allowed to trustees, &c. on sales made under the decrees and orders of the court, furnishes the proper standard of compensation, with the same discretion to increase it in case of extraordinary difficulty or trouble, or to reduce it in case of negligence, and an order will be passed in this case accordingly. Should circumstances arise hereafter involving the receiver in difficulties not now foreseen, it is presumed the means of remunerating him for such additional trouble will then exist, and will be brought to the attention of the court in the usual way; but as the case now presents itself, a departure from what the Chancellor considers proper to adopt as a general rule would not be justifiable.

Since writing the foregoing, the Chancellor has seen two other manuscript cases going to confirm his impression that no fixed rule has been established regulating the rate of compensation to be allowed to receivers of insolvent corporations or firms. The first is the case of *Edward Hughes vs. Charles P. Rogers and others*, in which by an order passed on the 17th of April, 1843, the receiver was allowed a commission of seven *per cent.* on his sales and collections as a compensation for his trouble, the sales and collections amounting to \$2983 09.

The other is the case of *Mayhew et al vs. Moore et al*, in which, if the defendants were not insolvent, their business was not only embarrassed, but broken up. In this latter case, the late Chancellor, by an order passed on the 10th of February, 1844, allowed the receivers the same compensation which is allowed upon sales made by trustees, &c. under decrees and orders of the court.

I repeat, therefore, the impression before expressed, that the order which I am about to pass, is not in conflict with the established practice of the court, or the analogy which my predecessor is supposed to have taken as his guide in similar cases.

There is a marked difference, it would seem, between the case of receivers clothed with the ordinary powers appertaining to that office, such as taking possession of the property and collecting and disbursing the rents and profits usually coming in, in small sums and covering a considerable space of time, where accurate accounts have to be kept of receipts, and trouble and risk incurred in preserving the vouchers of payments, and of those who promptly obtain an order for the sale of the property, and thus bring their task to a speedy termination. In this latter case, the trouble and risk is not only essentially diminished, but the fund upon which the commission is to be computed is greatly increased.

In this case an order was properly and promptly obtained for the sale of the property, and by the invitation to the creditors to come in with their claims, the proceeding is made to assume, in effect, the character of a creditor's bill, in which case, as the fund would be administered by the court, the trouble

and risk of the receiver would be the same, and no greater, than that of an ordinary trustee, thus rendering still more apparent the propriety of measuring the compensation by the same standard.

Independently of these views, it seems to the Chancellor that this case, so far as the question of commissions on the sales is concerned, is embraced by the standing order of March, 1817. That order declares that, "on sales under decrees and orders of the court, the following allowances to be made to trustees," &c. Then follows the scale which, as before mentioned, may, in the discretion of the court, be increased or diminished according to circumstances. The allowance, it will be observed, is to be made upon all sales under the decrees and orders of the court, and to trustees, &c. It applies to any sale made under the authority of the court, whether by a trustee or other agent, and as the sale in this case was made under an order of the court, and by an officer appointed by the court, it would seem to be in terms covered by the standing order, and as no special circumstances are yet shown, calling for the exercise of the discretion reserved to the Chancellor to enlarge the rate of compensation fixed by the order, he deems it proper to be governed by it in this case.

[The property of the company, which was sold in this case, consisted of steamboats and vessels used by them in the prosecution of their business, and other effects, and the crews who navigated these vessels, and the parties who furnished supplies to the vessels claimed a prior lien upon the proceeds of sale. These questions were argued and decided by the Chancellor in favor of the claimants, and his opinion, delivered upon the 20th of July, 1847, is reported in 1 *Md. Ch. Decisions*, 542. The case was afterwards again brought before the court in reference to certain claims which had been suspended by the previous order, and upon these the Chancellor delivered the following opinion.]

THE CHANCELLOR :

This case is brought before the court for further directions with regard to the claims suspended by the order of the 11th of September, 1847.

So far as relates to claim No. 101, being that of Bentley C. Bibb, it is understood that he holds in his hands money belonging to the company sufficient to pay his entire claim, and, therefore he is not, in any event, to receive any part of the money now under the control of this court. The question submitted is, whether of the cash in his hands, he shall retain the whole amount of his claim or a dividend only. His claim consists of two items, one of which is for wages due him as clerk on board the vessel, and the other of a draft in his favor, drawn by Captain Fairbanks, on the company, and accepted by the latter, and it is contended that as Bibb advanced the money for this draft, which was applied to pay the crew, that Bibb is entitled to be substituted in their place, and to be preferred to the other creditors ; that the order operated as an assignment of so much of the fund out of which the crew were to be paid, and places him, Bibb, in the shoes of the crew and entitled to their rights as their assignee. And that this is the effect of such a transaction in a court of equity, is, I think, fully supported by the authorities. 2 *Story's Eq., secs.*, 1043, 1044, 1047. Other parties are not prejudiced by it, because if the money of Bibb had not been applied in this way, the claims of the crew to be paid out of the fund would have been so much the larger. I think, therefore, that as the holder of this order he is entitled to be paid in full, and may retain accordingly, and that for the wages due him as clerk, he has the same rights, he standing in that respect upon an equal footing with the crew.

The claim of Freeland & Hall, No. 43, was excluded from a dividend by the order of the 11th of September, 1847, upon the ground that it was not sufficiently proved. Since that time a petition has been filed by these parties, in which they state that the omission to furnish proof in due time resulted from some misapprehension on the part of themselves and their solicitor, growing out of information said to have been communi-

cated to them by the receiver. The receiver has answered this petition in compliance with an order of the court, and although I am perfectly satisfied that there was no intention to mislead these parties, or to withhold from them any fact connected with the proceedings in the cause, yet I am strongly inclined to think that the petitioners acted under the impression that their claim was or would be allowed, and that this impression was founded upon information derived from the receiver. Under these circumstances, the receiver being the officer of the court, and there being a fund still under its control, without disturbing distributions already made, I think this claim should be let in for its proper dividend out of this fund, provided it be sufficiently established by the proofs. It is the duty of this court, as it seems to me, if suitors are misled by its agents, however innocently, to repair the injury, provided it can be done without prejudice to the ascertained rights of others, as appears to be practicable in the present instance. With regard to the proofs in support of this claim, I am of opinion, after a careful examination of them, that they are sufficient, and the claim will therefore be allowed its proper dividend.

The remaining claims are those due Samuel M. Shoemaker, numbered 102, 103 and 104. Of these, the two last are conceded to be sufficiently proved, and they, therefore, will be allowed. The claim numbered 102 is an open account, and consists of three items. The two last items seem to be proved, and will be allowed, and the first item being for the salary of the claimant, as agent of the company, will be allowed up to the 31st of August, 1846, when, according to his own deposition upon the petition of Freeland and Hall, he left the service of the company. After that time, of course, no such allowance can be made him.

It appears by the answer of the receiver to the petition of Freeland & Hall, that a considerable sum yet remains for distribution, out of which the claims now allowed may be paid their dividends so as to place them upon a footing of equality with other claims already allowed, of the same character.

GEORGE H. STEUART
 vs.
 HARRIET A. BEARD AND OTHERS. } MARCH TERM, 1849.

[DOWER.]

A HUSBAND purchased land of S. and gave his notes for the purchase money, and to secure the payment thereof, agreed that G., of whom he had purchased other land at trustee's sale, on which he owned a small balance of purchase money, and which was paid off by S., should convey the same to S., in trust, to secure said balance, and also said notes; S. was also the assignee of a judgment rendered against the husband, upon whose death a bill was filed to sell his real estate to pay debts, and it was agreed that the widow's dower should be laid off in the land so conveyed by G. to S. **HELD—**

That the husband had an equitable interest in the land conveyed by G. to S. subject to the payment of the sums secured by that deed, but not liable to the judgment so as to defeat the widow's title to dower: that judgment having been recovered after the marriage, is subordinate to the claim of dower, which commenced with the marriage and the purchase by the husband from G.

[The bill in this case was filed for the sale of the real estate of John Beard, deceased, for the purpose of paying his debts. It alleges, in substance, that complainant, as executor of George H. Steuart, deceased, and acting under his will, sold a tract of land to John Beard, on the 15th of April, 1839, for which the latter was to pay \$3000, secured by his six promissory notes, each for \$500, and dated the day and year aforesaid, and payable at one, two, three, four, five and six years from date; that for the purpose of further securing the payment of this purchase money, it was proposed by said Beard, and assented to by complainant, that the latter should pay off a balance of \$473 32, due by Beard on a tract of land which he had purchased from Louis Gassaway, trustee for a sale thereof, under a decree of the Court of Chancery, and a conveyance of said land should be made by said Gassaway directly to complainant, in trust, *first*, to indemnify the latter for his payment of said \$473 32, with interest, and *secondly*, to secure the payment of said six promissory notes so given to complainant by said Beard. That this arrangement was carried

out and the land conveyed by Gassaway accordingly, by deed dated the 11th day of December, 1840. The bill further charges, that complainant holds a judgment against said Beard, in favor of James Iglehart, rendered on the 29th of October, 1839, for \$761 63, with interest from the 1st of August, 1839, which was by said Iglehart assigned to, and entered for the use of, complainant. The other parts of the bill are not material to the question decided by the Chancellor and need not, therefore, be stated.

The deed from Gassaway, trustee, to the complainant, dated as above stated, conveys the land purchased from him at trustee's sale, by Beard to complainant in fee, "subject, nevertheless, to the terms set forth in the aforesaid exhibit B., filed with the aforesaid petition of John Beard, Stephen Beard and George H. Steuart." The terms of this exhibit the bill charges to be the arrangement between said John Beard and complainant, as above stated.

The question to be decided being in reference to the widow's dower, an agreement was filed, by which it was agreed, that Harriet A. Beard, the widow, was married to the late John Beard, before the execution of the deed by Gassaway to the complainant, and before the rendition of the judgment in favor of Iglehart, and that complainant was aware that she was the wife of the said Beard, at the time of the sale of the land by him to the said Beard, the assignment of the judgment to him by Iglehart and the execution of the deed by Gassaway. It was also agreed, that the dower of the widow should be laid off by metes and bounds, in the real estate of the deceased other than that sold to the said Beard by the complainant, subject, however, to the right of the complainant to make the said dower responsible for any deficiency in the payment of his debt out of the residue of the real estate, as if the said assignment of dower had not been made, if the court shall decide that her dower interest is, or ought to be, responsible for any part thereof. Upon this question, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

The deed from Louis Gassaway to the complainant, dated the 11th of December, 1840, conveys the property therein described, subject to the terms set forth in an exhibit marked B., and filed in the cause therein referred to. That exhibit does not appear among the proceedings in this case, but the complainant in his bill, alleges that by the terms of the deed from Mr. Gassaway to him, the property conveyed was vested in him to secure the payment of the sum of \$507 25, the amount paid by him to Gassaway, with the interest thereon, and the six promissory notes given by Beard for the land purchased by him of the complainant.

Supposing this to be a true description of the exhibit B., subject to the terms of which the deed from Mr. Gassaway was executed, I am of opinion, that the land which may be laid off to the widow for dower, is not liable for the judgment assigned to the complainant by Mr. Iglehart, the dower to be assigned according to the agreement filed on the 18th instant, not embracing any part of the land purchased by John Beard, deceased, of the complainant. The dower land will, however, be liable in case of deficiency for the purchase money of the land so purchased by John Beard and for the sum paid by the complainant to Mr. Gassaway, it being assumed that the dower is taken out of the land conveyed by the latter to the complainant.

John Beard, the deceased husband of Harriet, had an equitable title in the land conveyed by Gassaway to the complainant, subject to the payment of the sums intended to be secured by that deed, but not liable for the payment of the judgment of Iglehart recovered in 1839, so as to defeat the title of the widow to dower, unless that judgment was embraced in exhibit B., referred to in the deed executed by Gassaway. The judgment having been recovered after the marriage, must, unless secured by the deed, be subordinate to the claim for dower, which commenced with the marriage and the purchase by Beard, the husband, of Gassaway, in the mode recited in the deed of the latter to the complainant. This view of the rights of the parties, it is thought, is in conformity with the act of 1819, ch. 93, sec.

10, and the case of *Hopkins vs. Frey*, 2 *Gill*, 359, and *Miller vs. Stump*, 3 *Gill*, 304.

GEO. H. STEUART, for Complainant.

McLEAN, for the Widow.

R. M. GIBBS AND OTHERS	}	MARCH TERM, 1850.
vs. CUNNINGHAM AND OTHERS.		

[EXTENT OF LIEN—LIMITATIONS—SET-OFF—PRACTICE.]

A DEED was executed in 1835, conveying certain lands, in trust, with power to the grantee to sell the same and apply the proceeds to pay, *first*—A specified debt. *Second*—All other debts of the grantor for which the grantee was responsible, and any advances the latter might make for the former. *Third*—All other debts of the grantor at that time contracted which the grantee might consider just, legal, and equitable, and *fourth*—The expenses of the trust. The grantor died in 1837, and the grantee not having sold the property, a bill was filed in 1842, by the creditors of the grantor, under which all his real estate was sold for the payment of his debts. **HELD—**

- 1st. That the grantee, by virtue of this deed, had a lien only on the land described in and conveyed by it, but he may show himself a creditor beyond the provisions of the deed, and in respect of any such claim he will stand upon an equality with the general creditors of the grantor.
- 2d. That the claims of the grantee within the terms of the deed, and with reference to the proceeds of the property thereby conveyed, are not liable to the plea of limitations, but with regard to the proceeds of any other property of the grantor they are so liable.

Claims due by a guardian for property which he received from the mother of his wards, cannot be set-off against claims due to the guardian by the estate of their father.

There must be reciprocity and mutuality in the right of set-off, and the demands on the one side and the other must be in the same right.

A defendant to a creditor's bill, though he does not in his answer distinctly allege himself to be a creditor, and though he asks in his answer, to be dismissed with costs, may still after decree come in upon the fund as a creditor.

As a general rule, if the infirmity of the plaintiff's case appears upon the face of his bill, the defendant may rely upon it at the hearing, no matter how imperfect, or what the character of his answer may be, and it is only with respect to some defences given by statute that a different rule prevails.

[The facts in this case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR:

The questions now to be decided are stated in an agreement signed by the solicitors of the parties, and filed on the 18th of December last.

It appears, that on the 21st of October, 1835, the late James Cunningham and his wife conveyed to Henry Wayman three parcels of land, called "Latent Worth," "Glenn Eyery" and "Muddy Creek," upon certain trusts, as in the deed are set forth, that is to say, in trust, that Wayman and his heirs may in the first place, raise by sale of the same, or any part thereof, so much money as will be sufficient for the purposes of the trust; the said money to be applied to paying off the debts and responsibilities enumerated and provided for in the deed. These were *first* a debt of \$2000, to be created at the Frederick County Bank, for which Wayman was to become liable as Cunningham's surety. *Secondly*, to the payment of all other debts or liabilities of the said Cunningham, for which Wayman was in any manner responsible, and any money the latter might thereafter advance for, or on account of, said Cunningham. *Thirdly*, to pay all the debts of said Cunningham, at that time contracted, that Wayman might consider just, legal and equitable, and *Fourthly*, the expenses of the trust including a commission to the trustee, of six per cent. out of the whole amount of sales.

Cunningham and his wife died in or about the year 1837, and the trustee not having made sale of the property conveyed to him, a bill was filed by Gibbs and others, creditors of the deceased, in the year 1842, praying for a sale of the real estate of the deceased, for the payment of his debts, upon the ground that the personal estate was insufficient, and such insufficiency being established, a decree passed for a sale on the 13th of April, 1846, appointing a trustee for that purpose. The sale has been made and ratified, and the questions now presented have reference to the distribution of the proceeds.

Wayman, who was made a defendant to the bill, professes to

be a creditor, and upon the assumption that he is a creditor, the first question presented by the agreement is, whether he has by virtue of the deed of trust from Cunningham and wife to him, a lien or incumbrance on any land other than that described in, and conveyed by, said deed?

I do not understand the counsel of Wayman as contending absolutely for the affirmative of this proposition, and it seems to me very clear, that his lien, by virtue of the deed, must be restricted to the land described in and conveyed thereby.

2d. The second question is, whether Wayman can rely on, and enforce payment of, any claim which he may pretend to have against the estate of said Cunningham, other than such claim as may be secured by said deed of trust, and to the extent of the proceeds of sale of the trust estate?

Although I think it quite clear that the lien created by the deed must be confined to the three parcels of land embraced in it, it by no means follows, that if Wayman can show himself to be a creditor beyond the provisions of the deed, that he may not be permitted to do so, and that may not in respect of any claim so due him stand upon an equality with the general creditors of the deceased. To have a lien the claim must be within the terms of the deed, and such lien is confined to the lands described in, and conveyed by the deed, but this will not prevent Wayman from setting up and establishing if he can a claim beyond the deed, though in respect of any such claim he must occupy the position of a creditor at large, entitled only to such rights as the nature of his claim, independent of the deed, confers upon him.

3d. The third question is, whether the claims of Wayman, either in whole or in part, are liable to the plea of limitations? and if so, to what extent, and upon what principle is the rule to be applied?

My opinion is, that so far as the claims which Wayman can establish within the terms of the deed are concerned, and with reference to the proceeds of the property thereby conveyed, the plea of limitations does not apply, but with regard to the proceeds of any other property he has no lien by virtue of the

deed, and that, consequently, with respect to such proceeds he must share the fate of any other creditor, and be barred or not by limitations precisely as if the deed of trust had not been executed. In other words, I think the trust is limited to the parcels of property conveyed by the deed, and that with respect to any other property of Cunningham, it is entitled to be protected by all the defences which the parties would be at liberty to interpose if no trust had been created.

With respect to the sum of \$1491 12, said to have been paid by Wayman, on the 26th of August, 1842, being the interest to that date on the mortgage debt stated in the deed of the 26th of August, 1830, I think, assuming such payment to have been made, that Wayman is entitled to the benefit or the mortgage security, and that limitations will not bar him, so far as the proceeds of the mortgaged property are concerned. Any other claims, as I have stated, *ultra* the trust deed, are liable to be operated upon by the statute of limitations according to the nature of the claims respectively.

4th. This question relates to the doctrine of set-off, and, I am of opinion, that any claims which may be due from Wayman to the Cunninghams, as guardian, receiving property which they acquired from their mother, cannot be set-off against claims which may be due from the estate of James Cunningham.

There must be reciprocity and mutuality in the right of set-off, and the demands on the one side and the other, must be in the same right. *Hall's adm'r vs. Creswell et al*, 12 G. & J., 36; *Darnall vs. Hill*, 12 G. & J., 388.

In addition to the questions presented by the agreement, it has been insisted on the part of the defendants, that Wayman has no standing in this court as a creditor, because, in his answer to the bill, he does not claim to be a creditor.

It was decided by the late Chancellor, that a plaintiff in this court cannot be permitted to split up and multiply his causes of action, and, therefore, if he knowingly withholds a part of his claim until after the decree for a sale, it will be rejected, but without prejudice. *Welch vs. Stewart*, 2 Bland, 37. And in *Chambers vs. Chalmers et al*, 4 G. & J., 420, it was decided

by the Court of Appeals, that though as a general rule, the defendant might, at the hearing, object that the cause made by the bill does not entitle the plaintiff to equitable relief, though the particular ground of objection only appears upon the face of the bill, and though the issue has been joined upon the answer, that the rule does not apply to mere defences given by statute, and that unless such defences are brought forward by plea, or are relied upon in the answer, they will not avail the defendant at the hearing. This decision, however, only has reference to some defences given by statute against the relief sought by the bill, and does not reach the point now under consideration, which is, whether a defendant to a creditor's bill, who does not distinctly allege himself to be a creditor in his answer, may not after decree, come in upon the fund as a creditor? The general rule as shown by the case referred to is, that if the infirmity of the plaintiff's case appears upon the face of his bill, the defendant may rely upon it at the hearing, no matter how imperfect, or what the character of his answer may be, and that it is only with respect to some defences given by statute that a different rule prevails. But this is not a question of defence at all, either given by a statute or founded upon principles of equity. Wayman made no defence to this bill, but contented himself with stating the reason why he had not executed the trust vested in him by the deed, which, in his answer, he refers to as filed in the cause, and by the recitals of which, he, (Wayman,) does appear to be a creditor.

I cannot think, therefore, that he is precluded from showing himself to be a creditor, either because he does not distinctly state himself to be one by his answer, or because he asked to be dismissed with costs. He was not so dismissed, and could not be, as the legal title to the land was in him.

One of the objects of the trust deed, as shown by its recitals, was to secure Wayman the payment of money *then due* him from Cunningham, and this deed is filed as an exhibit, with the bill, and referred to and admitted by the answer. There can be no sufficient ground for assuming from the mere circumstance that Wayman asked to be dismissed with his costs, that

he did not intend, if the court should decree a sale of the property for the benefit of creditors generally, to avail himself of the provisions of the deed for his reimbursement and indemnification. I do not think, therefore, that he is precluded by the form of his answer from showing himself to be a creditor, and receiving such proportion of the proceeds of the sales as he may be entitled to.

ALEXANDER and STOCKETT, for Complainants.
A. RANDALL, for Defendant.

ROBERT WYLIE AND ROBERT Y. WILSON	}	DECEMBER TERM, 1849.
vs. WILLIAM BASIL AND OTHERS.		

[VACATING FRAUDULENT CONVEYANCES.]

PRIOR to the act of 1835, ch. 380, a creditor could not claim the aid of a court of equity in following real estate fraudulently conveyed away by his debtor, without first obtaining a judgment at law, nor personal estate, thus conveyed, without issuing a *fieri facias*, but this act has changed the law, in this respect, in this state.

The wife's share of her grandmother's personal estate was paid by the executor to the husband in his own right, and was applied by him in the purchase of property for which he took the deed in his own name, in 1842, and held the property as his own until 1847, when it was conveyed to his wife. **HELD—** That under these circumstances the property could not be regarded as belonging to the wife, but was liable to the husband's creditors.

[The bill in this case was filed by the complainants, creditors of Wm. Basil, to vacate two conveyances therein referred to, one from Basil and wife, conveying a house and lot in the city of Annapolis, to William Brewer, for the consideration of four hundred dollars, as expressed on the face thereof, paid by the grantee to the grantors; the other from Brewer and wife, conveying the same property to the wife of Basil, also for the consideration expressed on the face of the deed of four hundred

dollars, paid by the grantee to the grantors, and both bearing date the same day, 23d of April, 1847. The proceedings show that the same property was conveyed to Wm. Basil by Vachel Sevier and wife, by deed bearing date the 9th of December, 1842, for the consideration of one hundred dollars, expressed upon the face of the deed to have been paid by the grantee, Basil, to the grantors.

The bill in substance charges the indebtedness of said Basil to complainants prior to the execution of the deeds assailed, and that they were executed without consideration, and with a fraudulent design on the part of the parties thereto, to hinder and delay, defraud and cheat the creditors of said Wm. Basil, and prays for a decree vacating and annulling the same, and for a sale of the property thereby conveyed for the purpose of paying the debts of the said Basil.

The answers of Brewer and wife admit that no consideration was paid by Brewer to Basil and wife, nor by the wife of Basil to them, but that said deeds were executed for the purpose of vesting the title to said property in Basil's wife.

The answer of Basil and wife sets up the defence, that the property mentioned in said deeds was purchased with the separate property of the wife, which was acquired by her partly by her own exertions, and from the estate of her late grandmother. and at the time of said purchase from Sevier, she insisted that the property should be conveyed to her separate use, but finding that it had been conveyed to her husband, she insisting it should be conveyed to her, the deeds in question were executed for that purpose, and not for the purpose of defrauding the creditors of the said William Basil, or any of them as stated in the bill. Basil also avers that he had at the time of executing said deeds other property more than sufficient to pay all his debts then due and owing by him.

Proof was then taken, establishing the indebtedness of said Basil as alleged in the bill. The defendant proved, by Dr. John Ridout, that the wife of Basil was entitled from the estate of Sarah Terry to the sum of \$406 83, which, as executor and trustee, he paid to the said William Basil in right of his said

wife, at different times during the year 1842. That he understood that the said amount was applied in payment of the purchase money of the property mentioned in said deeds, and that part of said amount deponent knows was paid to Vachel Sevier upon that account.

The cause being submitted, the Chancellor delivered the following opinion.]

THE CHANCELLOR:

Prior to the act of 1835, ch. 380, the principle appears to have been well established that a creditor could not claim the aid of a court of equity in following real estate fraudulently conveyed away by his debtor without first obtaining a judgment at law, nor personal estate thus conveyed without issuing a *fieri facias*. These steps were deemed necessary in order to create a lien upon these two descriptions of property. In the case of personal property, in the language of Chancellor Kent, in *Hendricks vs. Robinson*, 2 *Johns. Ch. Rep.*, 296, "the judgment creditor should be required to make an experiment at law, and bind the property by actually suing out execution." And in *Brinkerhoff vs. Brown*, 4 *Johns. Ch. Rep.*, 677, "if he seeks aid as to real estate he must show a judgment creating a lien." The case of *Birely vs. Staley*, 5 *Gill & Johns.*, 432, was not designed nor does it shake these principles, though there were circumstances there which rendered them inapplicable.

But the second section of the act of 1835, ch. 380, has changed the law in this respect in this state by declaring, "that in a proceeding in equity to vacate a conveyance or other act as fraudulent against creditors, it shall not be necessary for the creditor plaintiff in the cause to obtain a judgment on his demand, in order to the relief sought in the case either in his or her own behalf, or in behalf of any other creditor who shall claim to participate in the benefit of the decree in the cause."

This act of the legislature appears to me to remove the only obstacle to the complainants' title to the aid of the court, and the deeds, therefore, impeached by this bill must be vacated, and the property sold for the benefit of the creditors of William

Basil. It may be, and indeed is, not improbable that the property in question was paid for with the money spoken of by Dr. Ridout, but it was paid by him to William Basil, not as trustee for his wife, nor as her separate estate, but in his own right, and if applied to pay for the property, it was so applied as his own, and the deed from the vendor, Sevier, taken to himself, and the house and lot remained, according to the evidence furnished by the public records as his property from the date of the deed in December, 1842, until April, 1847, when the deeds now sought to be vacated were executed. Under these circumstances, it seems impossible to regard the property as belonging to the wife, and it must, therefore, be liable to the creditors of the husband. The court will sign a decree accordingly.

F. H. STOCKETT, for Complainants.

J. PINKNEY, for Defendants.

JOHN B. WILHELM vs. WILLIAM WILHELM AND OTHERS,	}	SEPTEMBER TERM, 1849.
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[PARTITION OF REAL ESTATE UNDER ACT OF 1820.]

THE judgment of the commissioners to divide real estate, in regard to its susceptibility to be divided among all the heirs, though not absolutely conclusive, will not be disbursed without proof demonstrating error of judgment, or partiality, or some other good reason for disregarding it.

THE provision of the 9th sec. of the act of 1786, ch. 45, prohibiting the commissioners when the land is not worth more than \$15 per acre, from dividing it into shares of less than fifty acres, forms no part of the act of 1820, ch. 191, and was purposely dropped by the legislature.

THE objection that two of the heirs at law who are infants, have no part of the inheritance given to them until after the death of their mother the widow, the parts allotted to them being encumbered with her dower for life, is a fatal objection to the return of the commissioners.

THE right of election given to the eldest son by the act of 1820, ch. 191, is a valuable right, but has no existence and cannot be enforced unless the commissioners determine that the estate cannot be divided without loss and injury to all the parties, and their return to this effect is confirmed by the court.

Where lands are divided in specie under the act of 1820, the commissioners have no power to assign the widow a portion of the land, *in fee*, equal to her dower in the whole, for this would be in effect making her a co-heir.

[The bill, in this case, was filed for a partition of the real estate of John Wilhelm, deceased, among his heirs at law. The heirs at law were ten in number, and the commissioners decided that the land was capable of advantageous division into ten parts, and divided the same accordingly, making several of the lots to contain less than fifty acres. To this return some of the parties excepted, for the reasons stated in the following opinion of the Chancellor, delivered on the 18th of May, 1849.]

THE CHANCELLOR:

The objections of the complainant to the return of the commissioners resolve themselves into two. *First*, it is objected that the commissioners have divided the estate into too many parts, to the injury of the complainant and Eleanor and Charlotte Wilhelm. *Secondly*, that they have assigned to two of the heirs at law, who are minors, nothing for their present support, the parts allotted to them being encumbered with the dower of the widow for life.

The first objection I do not think well taken. The judgment of the commissioners in regard to the susceptibility of the estate to be divided among all the heirs, though perhaps not absolutely conclusive, is certainly entitled to great respect, and in the absence of proof demonstrating error of judgment or partiality, or some other good reason for disregarding it, should not be disturbed. In the language of the 8th section of the act of 1820, ch. 191, "the commissioners, or a majority of them, shall *adjudge and determine* whether the estate will admit of being divided without loss and injury to all the parties entitled," "and if they shall so *adjudge and determine*, then they shall divide and make partition fairly and equally in value between all the parties interested, according to their several just proportions," &c. The commissioners, in this case, have decided that the estate may be divided among all the parties

entitled, without loss or injury to any, and as there is no evidence other than that which is supposed to exist upon the face of their proceedings, I do not think the court should undertake to reverse their judgment. The provision found in the 9th section of the act of 1786, ch. 45, prohibiting the commissioners, when the land is not worth more than \$15 per acre, from dividing it into shares of less than fifty acres, forms no part of the act of 1820, and, it is fair to presume, was purposely dropped by the legislature.

But the objection that two of the infant heirs at law have no part of the inheritance given them until after the death of their mother, strikes me as much more formidable. There is nothing to show that they have any means of support independently of this property, and if that be the case, it is obvious they might be subjected to the most serious inconvenience, if not to absolute destitution. In the case of *Bennett vs. Bennett*, 5 Gill, 463, decided by the Court of Appeals, at December term, 1847, the objection now under consideration was brought to the notice of the court, and although the opinion as delivered does not express the views of the court upon this particular point, it is understood that such an objection to a partition under the act of Assembly was entitled to much weight, if it did not render it altogether void. Such a partition was regarded as ineligible and not to be viewed with favor. The return, therefore, in this case, will not be ratified, but the Chancellor forbears at present from passing an order, as the parties may possibly see some mode of avoiding a new survey.

[Another return was then made by the commissioners, which was again excepted to, and upon these exceptions the Chancellor on the 14th of November, 1849, delivered the following opinion, in which the exceptions and the return and partitions made are sufficiently stated.]

THE CHANCELLOR:

This case is submitted upon the objections of John B. Wilhelm and others to the several returns of the commissioners,

without any evidence in support of the exceptions founded upon the alleged inequality of the partition in point of value, or that the land was divided into too many parcels, and I am, therefore, of opinion, for the reasons stated in the remarks of this court in May last, that the exceptions of this character are untenable, and must be overruled.

A good deal has been said in this case upon the subject of the right of election given to the eldest son by the act of 1820, ch. 191, and the case of *Chaney and wife vs. Tipton*, 11 *G. & J.*, 253, has been cited to show that it is a valuable right secured to certain heirs by the act referred to, which becomes vested by the death of the intestate, and which may pass to a grantee. It is true it is a valuable right, but it is equally true that it is a right which has no existence, and which cannot be enforced unless the commissioners appointed to make the partition shall determine that the estate cannot be divided without loss and injury to all the parties. It is only upon their making a return of their judgment to that effect, and upon the confirmation by the court of this return that the right of election as prescribed by the statute can be executed. If the commissioners return, that the land may be divided, and this return is approved of, the right of election has no existence. In this case, the commissioners have made such a return, and there being no evidence impeaching their judgment or conduct in any respect, the right of election under the act of Assembly has no existence.

The commissioners by their last return have made a division of the dower land, and have given out of it to each of the infant heirs for whom no provision, *in presenti*, was made by their first return a share equal to a child's part, and to the widow the residue thereof in fee simple. There is no proof showing the inequality of this partition, though two exceptions charge such inequality, and an opportunity was given the exceptants to introduce their proof. It must be assumed, therefore, that the judgment of the commissioners in this respect is correct, and the fact as they have stated in their return.

The assignment of this parcel of land to the widow in fee simple is urged as an objection, and I think it is a good one.

It is true, that upon general principles, a court of equity may award to a widow, relinquishing her right of dower in the lands of her husband a sum of money equivalent to that right when she has agreed that the land may be sold, and they have been sold clear of that incumbrance. *Maccubbin vs. Cromwell*, 2 H. & G., 443. But that is when the heirs at law agree to a sale, or it becomes necessary to pay debts, or for some other purpose that the land should be sold, and the whole title derived from the ancestor passes. In such cases the advantage of selling an unincumbered title, and thereby benefiting the estate, is palpable, and no sound reason can be given why the widow should not have in money an equivalent for her interest in the land, the proceeds of which have been increased by her relinquishment to an amount at least equal to, and often greater than the sum awarded to her in lieu of her dower.

But this is a case in which a sale of the estate is not to be made. There is to be a partition of it in specie among the heirs at law, and it is proposed to carve out of it a portion equal to the widow's third for life in the whole, and give her that portion in fee simple. This would be in effect making her a co-heir with those whom the law makes the heirs of the deceased against their consent, and when many of them are minors and incapable of consenting. It is quite a different thing when the law or the necessities of the estate require the inheritance to be sold. Then the heirs at law are unavoidably deprived of the lands which descended to them, and must take their respective portions in money, if in the case of a sale to pay debts anything remains after the creditors are satisfied. The argument attempted here, however, proposes to foist in a new heir who shall participate with the rest in the inheritance, though the act to direct descents very clearly defines who shall be the heirs, and among whom the estate shall be divided. I am of opinion that this cannot be done, and my conviction is fortified by the fact that no precedent can be found for it.

It is stated in the argument of the solicitors for the parties who desire the return of the commissioners to be ratified, that they are authorized by the widow to surrender to her children

the reversion in the land allotted to her, and that she will put this surrender upon the record in a formal manner. Now, I cannot conceive of any valid objection to this arrangement by which the widow will get less than her dower interest in the whole estate. I must assume, and do assume, in the absence of proof to the contrary, that no injustice has been done to any of these parties by the commissioners. That they have received their fair proportions of the estate of their ancestor, and that the share allotted to the widow in fee simple is no more than an equivalent for her dower interest, and if so, what right have any of the parties to object if she willingly surrenders a portion of her share, thus taking less than the law would give her. She was entitled to one-third of the whole estate for life; she agrees to take less than a third for life, and to this I see no objection.

When the last survey has been passed by the examiner general, and the necessary act done to perfect the arrangement, a final decree will be passed.

ALEXANDER and McLEAN, for Complainants.

B. T. B. WORTHINGTON, for Exceptants.

FERNANDO WOOD	}	MARCH TERM, 1850.
vs.		
JOHN PATTERSON AND THE NASHVILLE INS. CO.		

[PRACTICE IN CHANCERY—INJUNCTION—MISTAKE.]

UPON a motion to dissolve an injunction, the responsive averments of the answer in the absence of countervailing testimony are to be taken as true, and if the facts constituting the equity of the bill are denied by such positive responsive averments, the injunction must be dissolved.

Equity has jurisdiction to grant relief in cases where parties have done acts or entered into contracts under a mistake or ignorance of a material fact: and this power is not confined to cases where a fact has been studiously suppressed or concealed by one of the parties, but embraces many cases of innocent ignorance and mistake on both sides.

There are many cases in which parol evidence at the instance of the complainant may be received to rectify a contract in unity, and in which the contract so rectified will be specifically executed.

But if the mistake is the result of the party's own carelessness or inattention, the court will not interfere in his behalf, its policy being to grant relief to the vigilant, and to put all parties upon the exercise of a reasonable degree of diligence.

If the fact be unknown to the parties, or each has equal or adequate means of information in regard to it, and the parties have acted with good faith, equity will not interfere.

In this case an injunction was granted upon the averment in the bill, that defendant offered to compromise a balance appearing to be due the complainant by certain accounts rendered, by the payment of a certain sum, and that in the addition of these accounts there was an error of \$1,000. The answer denied this allegation by averring that defendant's offer was made without any reference to the stated balance, but with reference to the details and items of the account, and to the grounds of the defendant's claims against complainant. **HELD**—That equity of the bill is sworn away by this answer and the injunction must be dissolved.

[An injunction was granted upon the bill filed in this case, and after answer, the cause was heard upon motion to dissolve. The facts of the case, and the allegations of the bill and answer are all fully stated in the following opinion of the Chancellor, delivered upon the hearing of this motion.]

THE CHANCELLOR :

The question, and the only question, presented on this motion is, whether the facts constituting the equity of the bill have been denied by the answer, because if so, and the denial is positive, the injunction must be dissolved according to the established law of the court.

The bill in this case alleges that in making up the accounts of the brig "Col. Howard," owned by the defendant, Patterson, an error was committed by the plaintiff's clerk, of one thousand dollars, to his disadvantage, in adding the charges in said account, which are \$1388 09 to the disbursements and advances, which are \$9855 43, making the sum total \$10,243 52, instead of \$11,243 52. That these accounts, with this error therein, were forwarded by the plaintiff from New York, without being examined by him, to Patterson, on the 9th of October, 1849, and that the complainant claimed from Patterson only the bal-

ance therein appearing to be due him, of \$2219 45, when but for the error, this balance would have been \$3219 45. That Patterson, thereupon offered to compromise this balance by paying the complainant the sum of two thousand dollars cash, and that for the purpose of an immediate settlement, and to save delay, he, the plaintiff, consented to take that sum in settlement of said balance, supposing that he was thereby abandoning only the sum of \$219 45, and for the purpose of effecting this settlement, he sent to his agent, in the city of Baltimore, all the papers relating to said brig, together with the policy of insurance for \$10,000, which Patterson had assigned to him by way of security for his advances, &c., to be delivered and reassigned upon payment of said sum of \$2000. That on or about the 20th of December, 1849, the settlement was concluded, the money paid by Patterson, and the policy reassigned to him by the complainant's agent. That about this time, by an accidental examination of his ledger, the complainant discovered this error in the account, and, thereupon, forthwith, telegraphed and wrote to his agent in Baltimore, and to the agent of the Insurance Company in that city, not to make the settlement or pay any money to Patterson, but the information did not reach Baltimore in time to prevent the settlement or the receipt by Patterson from the Insurance Company of a portion of the money due upon the policy though there still remains a large balance due thereon. That complainant has frequently since requested Patterson to rectify the error and pay him the sum of \$1000, but this he refuses to do.

Upon this statement, and upont his alleged error and mistake, the complainant seeks to have the settlement opened and set aside, the balance due him paid, and in the mean time that the Insurance Company may be restrained by injunction from paying to Patterson the balance due upon the policy.

An injunction was granted to prohibit the company from paying the sum of \$1000, but leaving it at liberty to pay to Patterson any surplus over that sum which might be due him.

The accounts which are filed as exhibits with this bill, and which are made up to the 8th of October, 1849, support its

allegations in reference to the error in the addition, and that error being corrected, there would appear to be due the complainant the sum of \$3219 45, instead of \$2219 45.

The gravamen then of this bill, as I understand it, is, that the offer of Patterson to compromise the claim, was founded upon the balance appearing to be due by him upon the face of the account. The allegation being, "that said Patterson thereupon offered to compromise *this balance* with the complainant by paying him the sum of \$2000 cash." Indeed, it would seem to be very clear, that but for this allegation, the plaintiff would be without title to the interference of the court, for it could not very well be maintained that if the settlement in question was made without any reference whatever to the accounts furnished by the complainant, but was determined upon to avoid litigation and prevent delay, that it would be competent to this court to set it aside because one of the parties, by a subsequent examination of his books has become dissatisfied with it. And especially all pretence of *mistake* would be excluded if the account in which the mistake occurred was not the basis of this settlement.

But this allegation that the offer of the defendant to pay the two thousand dollars by way of compromise was made with a view to the balance appearing due from him by the accounts sent him by the complainant, is expressly and pointedly denied by the answer, which avers, "that the defendant did not make the said proposal with reference to said stated balance, but with reference to the details and items of the account and to the grounds of the defendant's claims against the complainant," as in the answer are stated. And again, "that it was from this view of the wrongs done to him by the complainant" (the particulars of which are set out in a previous part of the answer,) "and looking to these claims against the complainant as counter to the items set forth in his said account, and not for or on account of the balance now appearing to have been erroneously stated, that this defendant balancing against his rights and his wrongs at the complainant's hands, the evils of litigation and the consideration of said complainant having the assignment of

the policy of insurance on said vessel that the defendant proposed to pay the complainant in full settlement of all his claims and for an assignment back to the defendant of said policy, the said sum of \$2000."

If, therefore, we are to give credit to the answer, and upon this motion, and in the absence of contervailing proof, the responsive statements of the answer must be credited, the balance appearing to be due from the defendant upon the accounts furnished him by the opposite party had nothing at all to do with his offer to pay the two thousand dollars, that offer being wholly irrespective of that balance, and founded upon an examination of the items comprising the account with many of which the defendant supposed he had just ground of complaint.

No doubt is entertained of the jurisdiction of this court to give relief to parties who have done acts or entered into contracts under a mistake or ignorance of a material fact. And the power of the court to grant relief in such cases is not confined to cases in which a fact has been studiously suppressed or concealed by one of the parties, which would amount to fraud, but it embraces many cases of innocent ignorance and mistake on both sides. For when the real intention of the parties has been disappointed by a mutual error in regard to a material ingredient in the contract, it is of the utmost importance that some court should have the power to correct the error and make the contract what it was really intended to be. About these principles there can be no dispute. 1 *Story's Eq.*, sec. 141, *et seq.*

And it is now settled in this state, that there are many cases in which parol evidence at the instance of the complainant may be received to rectify a contract in writing, and in which the contract so rectified will be specifically executed. The opinion of Mr. Chancellor Kent, in the case of *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.*, 585, maintaining this doctrine, received the full sanction of the Court of Appeals in this state, in *Moale vs. Buchanan et al*, 11 *G. & J.*, 314.

It is not, however, in every case of mistake, even of a material fact, that the court will grant relief, for if the mistake is the result of the party's carelessness, or inattention, the court will not interfere in his behalf, its policy being to administer

relief to the vigilant and to put all parties upon the exercise of a reasonable degree of diligence. So if the fact be unknown to both parties, or in regard to which each has equal and adequate means of information, if in such cases the parties have acted with good faith, equity will not interfere. 1 *Story's Eq., sections* 148, 149, 150.

It cannot, upon the state of this record as it now stands, be affirmed that the defendant has acted with bad faith. He swears his offer was made for the purpose of compromising a disputed account, and to avoid the evils of litigation. That he entertained objections well founded, in his opinion, to many of the items in the plaintiff's account, and that he had, as he believed, claims against the plaintiff counter to those which the plaintiff preferred against him. In this state of circumstances, and as he swears without any reference whatever to the balance appearing against him by the accounts sent him by the complainant, he made his offer of compromise, and surely in this, nothing indicative of bad faith can be discovered—nothing which looks like a disposition to overreach and take advantage of the complainant.

Nor do I find anything very material in the collateral circumstances pressed in the argument as manifestations of fraud. It must be recollected that the accounts in which the error occurred were forwarded by the complainant to the defendant on the 9th of October, 1849, and it was not until the 13th of the following month of December, that the latter wrote to the former, offering to pay him the sum of \$2000, "with a view," (as expressed in his letter,) "to an immediate and amicable settlement, and in full of all demands, on receiving back the policy and other documents concerning the brig in the plaintiff's possession." In this same letter, the defendant speaks of sundry overcharges in the plaintiff's account, but not particularizing them, and waiving these he made the offer referred to. Now, it seems to me it cannot be very fair to infer that if the defendant designed to impose upon the plaintiff by leading him into a settlement in which he had detected the error in question, that he would have said anything calculated to induce the complainant to a re-examination of it. He would, it seems to me, have said nothing

about errors or overcharges, which he might well suppose would result in the detection of the error, and thus frustrate the meditated fraud, but diverting attention from them, have made his offer in such terms as would not cause an investigation. Indeed, upon the supposition that he, the defendant, supposed the plaintiff would not be willing to give up more than \$219 45, he had better, at once, have paid the whole balance appearing to be due by the account, than start objections which were most likely to lead to the discovery of the error.

It is said, however, that this letter of the 13th of December, from Patterson to the plaintiff, is indicative of unfairness, because it presses for an immediate reply. That this eagerness is suspicious, and the motive for it is supposed to be bad. But it must be borne in mind the letter was not written until more than two months had elapsed from the receipt of the accounts by him, which fact is not easily reconcilable with a disposition to perpetrate a fraud, as he might well suppose that within that time the error would be discovered. If, however, any inference unfavorable to the defendant may be drawn from the fact that he asked for an immediate reply to his letter, to what are we to attribute the unusual promptitude with which his offer was acceded to by the complainant? Patterson's letter making the offer was written in Baltimore on the 13th of the month, and on the 14th, the very next day, the plaintiff replied from New York, accepting the offer. There was, then, quite as much anxiety manifested on the one side as on the other, and I think that neither can, upon this ground, be suspected of a disposition to take advantage of the other.

Without proceeding further, or considering how far the complainant may be affected by, or be subject to, the charge of negligence in not discovering the mistake at an earlier period, especially when his account had been called in question, I shall pass an order dissolving the injunction upon the ground that the equity of the bill, so far as relates to the injunction, is sworn away by the answer.

W. PINKNEY WHYTE, for Complainant.

CHARLES F. MAYER, for Defendant.

JOHN L. KERR AND OTHERS	}	SEPTEMBER TERM, 1848.
ADMRS. D. B. N. OF SAMUEL HARRISON,		
VS.		
ROBERT N. MARTIN AND OTHERS.		

[PRACTICE IN CHANCERY.]

PROOF taken under an *ex parte* commission cannot be read against defendants who answered an original bill, though they failed to answer a bill of revivor in the same case and an interlocutory decree was passed against them for such default.

[The facts of this case are stated in the opinion of the Chancellor.]

THE CHANCELLOR :

In this case a bill was filed by John Leeds Kerr, executor of Samuel Harrison, on the 8th of January, 1841, for the purpose of obtaining a decree for the sale of the real estate of Lloyd Nicholas upon the allegation of the insufficiency of the personalty.

After answers were filed to this bill, putting the plaintiff to the proof of his claim, and requiring him to show his title, to have recourse to the real estate of the deceased, the plaintiff in the cause died, and a bill of revivor was filed in the names of the administrators, *de bonis non*, of Harrison.

Some of the defendants answered this bill of revivor, but others of them being in default for not appearing and answering an interlocutory decree passed against them on the 28th of February, 1846, and an *ex parte* commission issued to prove the allegations of the original bill and bill of revivor. The commission issued accordingly, and having been returned, the case is now submitted by the plaintiff for a decree upon the proof taken under it, and notes are put in by the solicitors of the parties.

The defendant's counsel insists either that the case is not ready for a decree, and if now ready to be heard, it must be heard as if no proof was taken.

My opinion is, that the proof taken under the *ex parte* commission cannot be read against the defendants who answered the original bill, in support of the allegations of that bill. Upon looking at these answers, it will be found that the plaintiffs are put to the proof of their claim, and are required by evidence to establish their title to a decree. Now, although some of these defendants were in default in not answering the bill of revivor, it seems to me impossible to make out that their default in that particular shall deprive them of the benefit of their answers to the original bill, and that they have forfeited the right to have notice of the execution of the commission issued for the purpose of supporting the allegations of that bill, and yet all the proof taken in this cause in support of the original and bill of revivor has been *ex parte*, and without notice to any of the defendants. The defendants who had answered the original bill were not in default as to that bill, and there is nothing in the first section of the act of 1820, ch. 161, which would authorize an *ex parte* proceeding against them to support by proof the allegations of that bill.

But some of the defendants had answered the bill of revivor, and as to them confessedly the proof taken under the *ex parte* commission could not be read. The second section of the act of 1836, ch. 128, will not help the case. That act only in the cases specified therein making proof taken under a commission in chief evidence against defendants in default.

My opinion, therefore, is, that this case is not now ready. It is, thereupon, this 13th of November, 1848, ordered, that it stand over, with liberty to the parties to proceed as they may be advised, and as the condition of the cause may require.

A. RANDALL and N. HAMMOND, for Complainants.

THOS. S. ALEXANDER, for Defendants.

SAMUEL O. COCKEY	}	MARCH TERM, 1849.
VS.		
MARY ANN CARROLL AND FRANCIS B. LAWRENSON.		

[INJUNCTION TO PREVENT TRESPASSES.]

THE Court of Chancery in this state will not interfere by injunction where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction at law.

[The bill in this case was filed for an injunction to stay waste, the complainant, Cockey, being an infant and suing by David Carlisle, his guardian and next friend.

The bill, in substance, alleges, that Edward A. Cockey, the father of the infant complainant, died in 1834, leaving a will, by which he devised to complainant a tract of land in Baltimore county, which he had purchased many years before, and of which, after having long been in undisputed possession thereof, he died seized and possessed, and of which, since his death, complainant, by his said guardian, has been in the full and undisputed possession. That defendants, Carroll & Lawrenson, occupying an adjoining farm, have, within the last few months, entered with their teams and wagons, servants, carts, &c., upon said land, and have committed, and daily persist in committing, against the remonstrance and warning of his guardian and himself, the most injurious and destructive trespasses upon the said land, traveling and hauling loads over the whole breadth of the same, and cutting and removing the timber thereof, and doing the greatest and irreparable injury to complainant's said freehold and title by prostrating its forests and wood lands and arable lands, and removing the barriers placed there to insure the just enjoyment thereof, and to impede and prevent the incursions of said defendants, their servants, teams, &c. That he has commenced his action of trespass against them, for said wrongs and trespasses, in Baltimore County

Court, to recover damages therefor, but in the mean time and before the said action can be tried in the regular course of the court, the damage and injury done to his said freehold and estate and its just enjoyment, will, as he believes, be irreparable, by keeping open ways and roads upon and through it, and exposing it to the incursion and depredations of others, and injuring and permanently depressing its character, and the value and character of its title, and compelling complainant to bring a multiplicity of actions for its protection. The bill then prays for an injunction restraining said trespasses, which the Chancellor granted.

The answer of the defendants denies that they, their agents or servants have ever committed any trespass upon said land, and avers that the defendant, Carroll, has been seized in her own right, in fee simple, for more than forty years, of an elder tract of land, adjoining that of complainant, of which the defendant, Lawrenson, is the tenant, and that as owner and occupier of such elder tract, defendants have a right of way through and over the farm of complainant out to the county road, and that they and those under whom they claim have had, held and used the said right of way without any molestation, obstruction or question, uninterruptedly for sixty odd years, and that they so held and used and enjoyed the said right of way before said Edward A. Cockey purchased his said land, and during his lifetime, and whilst he held the same, and with his knowledge, and uninterruptedly until on or about the first of May last, when defendant, Lawrenson, whilst in the lawful and usual use and enjoyment of the said right of way, found the said road obstructed by some trees lying across the same, which had recently been placed there, and apparently with a view to obstruct him in the use of said road, and which trees defendant caused to be removed out of the road, but not from complainant's land, so as to permit him to pass with his wagon as he was wont and had a right to do. They deny that they, their servants or agents have ever cut or removed any timber from said land of complainant, except as above stated, and they deny that they, their servants or agents, have traveled or

hauled loads over said land, except as aforesaid, or entered upon or penetrated said land or removed any barriers thereon placed except as aforesaid. They deny that complainant has sustained any injury, in fact, from the acts of defendants, but admit he has brought suit against them, as stated in the bill.

A motion to dissolve the injunction was then made, and testimony taken under a commission issued by agreement of parties, to be read at the hearing of this motion. The purport of this testimony sufficiently appears from the following opinion of the Chancellor.]

THE CHANCELLOR :

The allegations of this bill, which stated a case of irreparable mischief, are so far denied by the answer that the injunction must be dissolved unless the proof shows that the trespasses complained of are such that adequate compensation at law could not be given, for it is now settled definitively that the Court of Chancery in this state will not interfere by injunction where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. *Amelung et al*, vs. *Seekamp*, 9 G. & J., 468. The proof in this case does not show such irreparable mischief, and therefore, the injunction must be dissolved.

J. J. SPEED, for Complainant.

T. P. SCOTT, for Defendant.

EDWARD LAROQUE AND OTHERS }
 VS.
 JOSEPH CANDOLLE.

JULY TERM, 1852.

[COUNSEL FEES.]

COUNSEL fees for services rendered by a solicitor at the instance of an attorney in fact of the *cestui que trust*, will not be allowed out of the trust fund. The trustee will be allowed all his reasonable costs and expenses including money paid in properly taking the opinion, and procuring the direction and assistance of counsel in administering the trust, but this is the utmost extent to which the practice has been carried.

In this case, certain property was sold under a decree of this court, by Edward Laroque and Charles F. Mayer, trustees, and the only question decided, in the opinion of the Chancellor, below, arises upon the petition of James C. Ninde, filed in the cause on the 21st of June, 1852.

This petition alleges, in substance, that said Ninde was in 1843, employed by Joseph L. Bonnet, the attorney in fact of some of the parties interested in the property sold, residing in France, as solicitor to represent their interest in this cause, then pending, for the purpose of procuring a decree for the sale of said property. That he continued to render his services as such solicitor at various times from the period of his employment down to the month of June, 1851, when the power of attorney under which said Bonnet was authorized to act as attorney in fact for said parties was revoked. That he has never been paid for his said professional services, which he estimates at \$200, and prays for an allowance therefor out of the trust funds in the hands of the trustees.

This petition was resisted, and a general replication thereto entered, and evidence taken in support thereof, which it is not necessary to state, as the petition was dismissed upon other grounds stated in the following opinion of the Chancellor.]

THE CHANCELLOR :

The matter of the petition of Joseph C. Ninde being submitted by the parties under the order of the 22d of June last,

the proceedings have been read and considered. It is an application by a solicitor for a fee to be paid out of a fund under the control of the court for professional services rendered at the instance of an attorney *in fact* of the *cestui que trust*, and not of the trustees. There is no evidence that the trustees either desired, or needed, the aid of counsel to assist them in the discharge of their duty, nor is there any evidence that by their negligence the interposition of counsel employed by the attorney in fact was necessary. So far from this, the proceedings in the case show that the interests of the attorney in fact and of the *cestui que trust* became, in the progress of the cause, and at an early stage of it, antagonistic.

It is the practice of the court, under the head of "just allowances," to reimburse the trustee when administering his trust under its direction, all his reasonable costs and expenses, including money expended by him in properly taking the opinion, and procuring the direction and assistance of counsel. 2 *Daniell's Ch. Pr.*, 1430, 1431; 2 *Bland*, 417; 3 *Daniell's Ch. Pr.*, 1586. But it is believed this is the extent to which the practice has been carried, and that no case can be found or rule of practice shown in which the court has undertaken to lay its hands upon the money of the *cestui que trust*, and pay it to a party claiming to be his or her counsel. In this case, the claim is denied and resisted, and it would, as I conceive, not only be without precedent, but eminently improper in this court to pass upon the question in dispute. Such a practice would draw to it a vast number of controversies which can much more appropriately and satisfactorily be determined by a different tribunal.

This is not the case of a trustee asking an allowance when the aid of counsel has become necessary in the administration of the trust, but the application is by the counsel who, claiming to have rendered services to the *cestui que trust*, asks to be paid out of the fund belonging to her. This cannot be done. It is, therefore, ordered, that the said petition be, and the same is hereby dismissed, with costs, to be taxed by the Register.

TEACKLE, for Petitioner.

DOBBIN and TALBOTT, for the Parties opposing the application

WILLIAM S. GREEN'S
ESTATE.

} MARCH TERM, 1848.

[PRIORITY OF THE STATE—CONSTRUCTION OF RESOLUTIONS OF THE LEGISLATURE.]

It is no exercise of judicial power for the legislature to pass resolutions directing credits to be entered upon judgments recovered by the state against a county clerk, and the sureties upon his bond.

The state has control over her own claims, and the legislature may remit forfeitures incurred by public officers who have become debtors to the state, and in cases where they think proper may surrender interest, or allow, as a credit, interest on credits which they may admit should theretofore have been given; such an exercise of power is no violation of the 4th article of the declaration of rights.

The legislature passed resolutions directing the treasurer "to examine the accounts" of a late county clerk, "and correct the same by crediting him with the commissions allowed by law to county clerks on collections made, and which commissions may have been heretofore withheld because of his delay in making his payments into the treasury within the time limited by law, and with the interest upon the amount of said account," these credits to be "applied to judgments recovered by the state against said clerk, and his sureties," "but nothing herein contained shall relieve the defendants in said judgments from costs and the usual commissions to the state's attorney."

HELD—

That by the true constructions of these resolutions the credits to be allowed could not exceed the amount of the judgments mentioned in them, and no excess of such credits could be applied to the extinguishment of other claims due by said clerk, to the state.

These credits are a gratuitous grant by the state, and such a grant must be restricted to its obvious and plain intent, and be construed most favorably for the government.

Two judgments were rendered against a party on the same day, one at the suit of the state, and the other at suit of a private citizen, that of the state, standing first upon the docket. HELD—that the judgment in favor of the state is entitled to priority in payment.

Wherever the state and a citizen have claims in equal degree, and a conflict arises by death or act of the party not having enough to pay his debts, the claim of the citizen must yield to the right of the state.

[The mortgaged real and personal estate of Wm. S. Green, formerly clerk of Anne Arundel County Court, was sold under a decree of this court in this cause, for the purpose of paying the various incumbrances upon it. The bill was filed by the

attorney general, in behalf of the state, on the 6th of July, 1844. Several judgments had been recovered by the state against said Green and Brown & Welch, the sureties on his official bond. The said Green had also executed a mortgage of his real estate to the Farmers Bank of Maryland, to secure an indebtedness due by him to the bank, in which mortgage Matilda E. Green, his wife, united, it being the only conveyance of his real estate in which his said wife did so unite.

On the 10th of March, 1847, the legislature passed the following resolutions. No. 64.

"Resolutions in favor of William S. Green, Robert Welch of Ben., and Samuel Brown, junior.

"Resolved by the General Assembly of Maryland, That the treasurer be, and he is hereby authorized and directed to examine the accounts of William S. Green, late clerk of Anne Arundel county, and correct the same by crediting him with the commission allowed by law to county clerks on collections made, and which commissions may have been heretofore withheld because of the delay of said Green in making his payments into the treasury within the time limited by law for the purpose, and with the interest upon the amount of said account.

"Resolved, That the governor be, and he is hereby authorized and requested to purchase of William S. Green, the files of the Maryland Gazette, from the commencement of the publication thereof to the time of its discontinuance, and to pay therefor by a credit to the amount of the purchase on the judgment recovered by the state of Maryland against the said William S. Green, Robert Welch of Ben., and Samuel Brown, junior; provided, that the sum allowed for said paper shall not exceed the sum of one thousand dollars.

"Resolved, That the credits which may be allowed by the treasurer under the first of the foregoing resolutions shall be applied to the aforesaid judgment; but nothing herein contained shall relieve the defendants to said judgments from the costs recovered by said judgments, and from payment of the usual commission to the state's attorney on the sums which may be credited under the foregoing resolutions."

The treasurer, by his construction of these resolutions, refused to credit on the said judgments against Green and his sureties, any thing more than commissions, after the usual rates, on the principal sums for which said judgments were rendered and the interest on the same. The attorney general also, further insisted that these resolutions were obtained by surprise and misrepresentation, and further, that the legislature had no authority to pass them, and that they are void, as being in contravention of the 4th and 6th articles of the declaration of rights.

Brown & Welch, the sureties of Green, insisted that by the true construction of these resolutions they were entitled to have credited on said judgments all the commissions which may have been *at any time* heretofore forfeited by said Green as clerk, and *all* the interest on balances against him which may have been *at any time* heretofore paid into the treasury, and that such was the design and intention of the legislature in passing said resolutions. They accordingly, on the 4th of May, 1847, filed their bill against the attorney general for an injunction, restraining execution on these judgments until the further order of the court, and from a *pro forma* order of the Chancellor, continuing this injunction, the attorney general appealed. This appeal was argued in the Court of Appeals, at its December term, 1847, when the decree was affirmed, ARCHER, C. J. delivering the following opinion of the court, which has not before been reported in any of the Maryland reports.

“The resolutions of the legislature, referred to in the record, are so clearly and unambiguously worded as to leave no doubt of their construction.

“The first resolution requires the accounts of William S. Green, clerk of Anne Arundel county, to be examined and corrected by allowing him for commissions which may have been withheld because of his delay in making payments into the treasury within the time limited by law for the purpose, and also with interest.

“These accounts were kept at the treasury against William S.

Green, and they extended from 1834 until ——. He was to be credited with commissions withheld, and with interest, and these accounts were to be corrected by such credits. It is not intimated that he is only to be credited with forfeited commissions and interest accruing for the time covered by bonds upon which the suits are brought. On the contrary, the clear meaning of the resolution is, that he is to be credited with all forfeited commissions and interest.

“Then the third resolution directs in what manner these credits shall be applied. It is expressly said they shall be applied to the credit of the judgments obtained by the state against Green, Welch and Brown. It is true, the word “judgment” is used in the second resolution in reference to the purchase of the Maryland Gazette, and in the first part of the third resolution, but the proviso in the third resolution speaks of the judgments and clearly shows that the design was to apply the credits to the judgment against the said defendants. As to the application of these payments language could not make the design of the legislature plainer. The resolution is express, and nothing is left for construction.

“There can exist no constitutional objection to the resolution. In its passage the legislature exercised no judicial power. The state was the plaintiff, and the legislature representing the state, might, at her pleasure, give directions in relation to the judgments, and might abate the same by such credits as she pleased to give, as any other plaintiff might do.

“It is objected that the resolutions are void by reason of the fourth article of the declaration of rights, which declares that “all persons invested with the legislative or executive powers of government are the trustees of the public,” and that such an exercise of power is a violation of a delegated trust. This objection we do not think has been maintained. Since the organization of the government, powers of a similar kind in regard to the debtors of the state have been exercised without ever having, until now, been doubted or questioned. The state has certainly control over her own claims, and may lessen the severity of her enactments in regard to her public officers who

become her debtors, by remitting forfeitures, and in cases which, in the judgment of the legislature, may seem proper, may surrender interest or allow as a credit, interest on credits which they may admit should theretofore have been given, without being considered as in any manner violating the great trust confided to her.

“But it is further urged that the resolutions are void as having been obtained by surprise, concealment and misrepresentation. The legislature might, certainly, without such imputation, have refused to purchase the Maryland Gazette for \$3,500, and yet have been willing to restore to Green his commissions and the interest. As to the operation and extent of this allowance, it is evident they were aware that the result might be to defeat the state in any recovery against Green or his securities on the judgments, for they make provision that the defendants shall not be relieved from costs. *Decree affirmed.*”

In the further progress of the cause, the Auditor stated several accounts, to which, and to his report made on the 26th of May, 1848, various exceptions were filed by the several parties interested, which are disposed of in the following opinion of the Chancellor, in which also the said exceptions will be found to be sufficiently stated.]

THE CHANCELLOR :

This case is brought before the court upon exceptions to the report of the Auditor of the 26th of the past month, and the several questions argued will be briefly considered.

The exception of the Farmers Bank, founded upon the omission of the Auditor to assign to the exceptant out of the proceeds of the mortgaged real estate, the value, whatever it was, of the contingent dower right of Mrs. Matilda E. Green, I think well taken, and this exception is sustained.

The next question involves the construction which should be put upon the resolution of the General Assembly, passed at December session, 1846, No. 64. It purports, upon its face, to be a resolution in favor of Wm. S. Green, Robert Welch of

Ben., and Samuel Brown, Jr., and it appears by the proceedings in the cause that the two latter were sureties for the former, and that judgments were recovered against them all jointly for debts due the state.

These resolutions have received a construction by the Court of Appeals, but I do not understand the interpretation put upon them by that tribunal, warrants the view now taken of them by the counsel of the parties having interests hostile to the state. The question before the Court of Appeals was between Brown and Welch, and the state, and had reference to the extent of the credits which should be given upon the judgments against those parties as the sureties of Green. And it is perfectly manifest from the opinion of the Court of Appeals that all the credits to which, in their view, those parties were entitled, were to be credited upon these particular judgments, and that they never contemplated credits exceeding their amount.

But the point now urged is, that according to the true interpretation of these resolutions, Green, the principal debtor, was entitled to credits going beyond the amount of the judgments mentioned therein, and that the excess, after satisfying them, shall be applied in part extinguishment of other claims due by him to the state. This position, I am persuaded, cannot be maintained, it being to my mind very clear that the legislature never contemplated such a result. On the contrary, the credits which the resolutions direct shall be given are specifically and in terms applied to the judgments of the state against Green, Welch and Brown.

These credits, it will be recollected, at least so far as the interest and commissions are concerned, are mere gratuities to the defendants, Green and his sureties, the state receiving no valuable consideration for them of any description. They are the mere grant of a bounty by the state, and I hold the doctrine to be very clear, that whatever the rule of interpretation may be with regard to grants by the state upon a valuable consideration, and without deciding whether the construction of such grants, and the deeds of individuals should be different,

the construction of a gratuitous grant by the state must be restricted to its obvious and plain intent. The grant of a donation flowing from the bounty of the government must be construed most favorably for the government. See Mr. Justice Story's opinion in the case of *Charles River Bridge vs. Warren Bridge*, 11 *Peters*, 590, 597.

If the view of the counsel who urge this construction be correct, then it would follow that if the state had no other claims against Green than the judgments mentioned in the resolutions, that the excess of the credits after satisfying those judgments, would have to be paid him out of the treasury in money. This consequence would be inevitable, though the provision in the resolutions that the defendants should not be relieved from the payment of costs and commissions to the state's attorney, show clearly that in no event did the state purpose to pay anything out of the treasury.

I do not deem it necessary to go into a critical examination of the language of the resolutions, because I think the general intent is sufficiently obvious to make this unnecessary, but I think it quite apparent that when the legislature spoke of crediting Wm. S. Green with commissions which had been withheld from him because of his delay in paying the money due from him into the treasury within the time limited by law, they never supposed they were directing him to be credited with commissions on moneys which he not only had delayed to pay, but which he has not paid to this day. The law says, that if the county clerks do not pay into the treasury within a limited time the money received by them for the state, they shall not be allowed the commissions to which otherwise they would be entitled. In other words, their commissions shall be withheld. Mr. Green had omitted to pay in time, and when he came to pay subsequently, the treasurer withheld the commission. He withheld it because of the *delay* in making the payment, and it was the commissions thus withheld which the legislature intended should be credited, and in my opinion, to push the resolution further, and construe it to mean that credits were to be given upon moneys which never had been paid at all,

would be to carry it much beyond the meaning of those who passed it.

It seems two judgments were rendered against Wm. S. Green on the 17th of April, 1837, one at the suit of the state, the other at suit of Nicholas J. Watkins. They were rendered on cases filed and docketed by consent, that of the state, however, standing first upon the docket. The question submitted is, how are these judgments to be paid? Shall they come in and be paid *pari passu*, or is the state entitled to priority in payment, assuming that the parties, in virtue of their judgments, stand in *equali jure*, which they do if the judgments are to be regarded as cotemporaneous.

Now, I take it to be well settled that the state, by the common law, is entitled to such priority, and that whenever she and a citizen have claims in equal degree, and a conflict arises by death or the act of the party not leaving enough to pay his debts, the claim of the citizen must yield to the right of the state. 2 H. & McH., 198; 3 H. & McH., 171; 1 H. & J., 417. This principle was affirmed by the late chief justice of the Court of Appeals, in the elaborate and able opinion delivered by him in the case of *The State vs. The Bank of Maryland*, 6 Gill & Johns., 205, 226. It was said in that case, "that the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be paid first where the individual creditor has no antecedent lien overreaching it." The state, then, is entitled to her priority, unless there is an antecedent lien, and here there is none. I am of opinion, therefore, that the judgment of the state of April term, 1837, is entitled to a priority over that of Nicholas J. Watkins, rendered at the same term.

Ordered, that the case be, and the same is hereby referred to the Auditor, with directions to state a further account in which the Farmers Bank of Maryland shall be credited with such sum of the proceeds of the mortgaged real estate as may, according to the tables, be an equivalent for the contingent dower interest of Mrs. Matilda E. Green, the widow of William S. Green, she having relinquished her dower to said bank.

He will then correct his statement of the claim of the state of Maryland, according to the treasurer's statement, No. 1, filed on the 16th instant, and will also credit the judgments against Green, Welch and Brown, in conformity with the agreement of the counsel, filed on the 22d instant.

The residue of the proceeds of the mortgaged real estate, after deducting and appropriating to the bank the value of the contingent dower interest will be applied to the payment of the claims of the state, founded upon its judgments of October term, 1836, and April term, 1837, and any balance which may remain of said proceeds after satisfying those judgments will be applied to the payment of the judgment of Nicholas J. Watkins, of April term, 1837.

All exceptions at variance with this order are overruled.

[No appeal was taken in this case.]

BOYLE, for the State.

A. RANDALL, for the Farmers Bank.

THOS. S. ALEXANDER, for Defendants.

JACOB I. COHEN ET AL	}	
vs.		
WILLIAM GWYNN ET AL.	}	DECEMBER TERM, 1848.

[TRANSFER OF STOCK—NOTICE.]

THE stockholders of a theatre appointed six persons trustees for its management by whom the transfer books were kept, and in 1841, two shares standing in the name of one of the stockholders was transferred by the firm of which he was a member to a *bona fide* purchaser for value without notice, in whose name they remained until 1848, (he in the mean time having transferred them to parties who retransferred them to him,) when objection was made by the other stockholders to the title of such purchaser. **HELD—**

That the trustees, were the trustees of the stockholders, and if they suffered the stock to be transferred to a *bona fide* purchaser without notice, by a person not having authority to make the transfer, the loss, in a contest between such purchaser and the stockholders, must fall upon the latter.

A memorandum made on the transfer book *after* the purchase of the stock by a *bona fide* purchaser, showing the arrangement under which certain of the stock was transferred, cannot effect such purchaser with notice of this arrangement.

[In this case a decree for the sale of the Holliday Street Theatre, in the city of Baltimore, was passed, the sale made and ratified, and the proceeds brought into court for distribution. A statement of the proceedings up to the ratification of the sale will be found in the cases of *Wagner & Marshall vs. Cohen*, 6 *Gill*, 97, and *Cohen vs. Wagner*, 6 *Gill*, 236. The questions now decided by the Chancellor arise upon the distribution of the proceeds, and are presented by a petition filed on the 20th of September, 1848, by James V. Wagner and others, and exceptions to the Auditor's account filed by the same parties about the same time.

The petition in substance alleges, that certain persons including B. I. Cohen, were trustees of the Holliday Street Theatre property, and as such received large funds into their hands for which, with the exception of said Cohen, they had all faithfully accounted. That said Cohen, on the 18th of December, 1839, borrowed of the treasurer of the said board of trustees \$462 50, of the trust funds, for which he gave his bond of that date, which is filed with the petition. That afterwards, on the 20th of October, 1842, said Cohen agreed to transfer shares of stock at \$125 per share, to cover his indebtedness, the other trustees doing the same thing, at the same time, and have done so, which shares they have also brought into distribution among the stockholders in this case. That Mendez I. Cohen was aware of such arrangement and has repeatedly stated that the trustees of the theatre had stock transferred to them belonging to the theatre. That said Mendez, knowing such fact, obtained a transfer of thirty-five shares of said stock from J. I. Cohen & Brothers, in which said B. I. Cohen was interested to an amount exceeding four shares. That said B. I. Cohen died, leaving one share standing in his name, and that letters of administration upon his estate have been granted to his son, Israel I. Cohen, who holds assets sufficient to meet this claim, and who is now claiming the dividend on said share. The petition prays, that said Israel I. Cohen may pay into court the amount of the bond given by his father, or deliver up to be cancelled four shares of the stock of the theatre, or that he may deliver up the said one

share, and the said Mendez I. Cohen may deliver up three shares of his stock to be cancelled, so that the value of said four shares may be divided among the other stockholders.

Mendez I. Cohen, by his answer, under oath, sets up the defence that he is a *bona fide* holder and purchaser of the stock held by him in the said theatre, for value paid, and without notice, knowledge or belief of the existence of any arrangement or understanding between the said B. I. Cohen and the other trustees at the time of his purchase, and that he is not responsible in any way for the failure of the said B. I. Cohen, to comply therewith if any be established. He admits that he knew from the transfer books, that the trustees, other than B. I. Cohen, had stock in their names, and no doubt he has so stated. He further admits that he purchased stock from the house of J. I. Cohen & Brothers, in which the said B. I. Cohen was interested as a partner, and it may be that his interest in the stock they held ascertained by his interest in that house exceeded four shares, but with that he submits he has no concern and has no knowledge.

The proof taken, and the other proceedings in the case upon this petition, and the exceptions, are sufficiently stated in the opinion of the Chancellor.]

THE CHANCELLOR:

This case comes before the court upon exceptions to the report of the Auditor, but the agreement of counsel filed on the 12th inst., reduces the questions in controversy to two.

The first of these, and the only one which has been argued, has respect to the ownership of the two shares of stock in the Holiday Street Theatre, the proceeds of the sales of which, made under a decree of this court, are now to be distributed. The shares in controversy are designated by the numbers 44 and 76, and were together with thirty-three other shares of like stock transferred to Mendez I. Cohen, by J. I. Cohen, Jr. & Brothers, on the 14th of June, 1841.

It appears by the transfer book that shares numbered 44 and 76, were transferred to B. I. Cohen, who was a partner in the

Banking House of J. I. Cohen & Brothers, in the year 1839, by the then proprietors thereof, and that no transfer of these shares was ever made by B. I. Cohen individually.

It also appears, that in the year 1827, six gentlemen were appointed trustees of the theatre, under an agreement between the stockholders and William Warren, the terms of which are stated by Mr. Meredith, in his deposition. The trustees were Messrs. Gwynn, Lucas, Stewart, Frick, B. I. Cohen and Meredith.

By an arrangement, the details of which are given in the deposition of the same gentleman, certain shares of stock which stood in the name of B. I. Cohen were transferred by him to individual members of the trustees in extinguishment of a debt due by Cohen to the trust fund, with an understanding that each of the trustees to whom transfers were thus made should give bond for the same, and should also, as a further security, retransfer the stock to the treasurer of the board of trustees, retaining, however, the use of the shares until they should be called upon to surrender them. Bonds were accordingly given by all the parties, including B. I. Cohen, who retained four shares under the arrangement, and in November, 1842, all the parties except Cohen, retransferred to the treasurer the shares placed in their respective names, with a memorandum opposite each transfer, in the transfer book, that the same was made as collateral security for the bonds given by them as above mentioned.

On the 11th of April, 1843, Mendez I. Cohen transferred to Johnson & Lée, the same thirty-five shares which on the 14th of June, 1841, had been transferred to him by J. I. Cohen & Brothers, and on the 23d of May, 1843, Johnson & Lee retransferred the same thirty-five shares to him.

B. I. Cohen having died indebted to the trust fund in the amount of the bond so given by him, being \$426 50, and having but one share of stock now standing in his name, certain parties, having an interest in the fund for distribution, object to the allowance to Mendez I. Cohen, of the dividend due upon shares numbered 44 and 76, because as they allege, these shares constituted a part of the trust fund, and were known to be such

when he acquired them. The objection which was presented by petition and exception to the report of the Auditor, extended originally to four shares, parcel of the 35 shares transferred to Mendez I. Cohen, in 1841, but by the agreement before spoken of, has been narrowed down to the two shares numbered 44 and 76.

Mr. Cohen, by his answer, upon oath, takes the ground that he was a *bona fide* purchaser, for value of these shares, without notice of the arrangement between B. I. Cohen and the other trustees, and it appears by the evidence that he did purchase, and pay a valuable consideration for them, to the Banking House of J. I. Cohen & Brothers. He gave one hundred and forty dollars per share for them, and the Banking House being indebted to him in a larger amount at the time of the purchase they were paid for by debiting his account on the books with the amount.

The transfer book kept by the trustees of the theatre, which has been offered in evidence, shows that the shares in dispute were in fact transferred to Mendez I. Cohen by J. I. Cohen & Brothers, in June, 1841, and as the transfers made by the trustees of the shares of stock which they received of B. I. Cohen, under the arrangement spoken of by Mr. Meredith, were not made until 1842, and as the memorandum placed opposite to these transfers is the only evidence relied upon to bring home to Mendez I. Cohen notice of the nature of that arrangement, it seems very clear that he cannot be affected with notice.

Mr. Cohen does not deny that he had notice from the transfer books, that the trustees (other than B. I. Cohen) had stock in their names, but there is nothing to show that in June, 1841, when he received from J. I. Cohen & Brothers, for a valuable consideration paid them, a transfer of the shares in question, he knew of the arrangement between B. I. Cohen and the trustees. The entry in the transfer book relied upon to affect him with notice, was made at a subsequent period.

But it is said, that the transfer of these two shares by Cohen & Brothers to Mendez I. Cohen is void, because they belonged not to those parties but to B. I. Cohen individually.

B. I. Cohen, however, was a member of that firm, and it nowhere appears that he made any objection to their authority to make the transfer. This transfer was made in 1841, and it is not until 1848, that the power under which it was made is questioned. On the contrary, in 1843, Mendez I. Cohen's right to deal with these shares as his property is recognized by the transfer made by him in April of that year to Johnson & Lee, and by their retransfer to him in May following.

The question to be decided is between a *bona fide* purchaser for value and without notice, on the one side, and the general mass of the stockholders on the other. The transfer book which appears to have been very carefully kept, was of course at all times open to the inspection of the trustees, and was, in fact, kept by one of them. It contains the evidence of the title of the shareholders to their stock, and a purchaser might well suppose that his title was good to shares transferred to him upon the book, and permitted to remain in his name without objection for a number of years. It seems to me, that in a question affecting the validity of a transfer under the circumstances of this case, between a *bona fide* purchaser, without notice, and the stockholders generally, that the latter must be concluded by the conduct of the trustees, active or permissive, in suffering the transfer to be made and to stand. It is true, this was a private association and not a corporation, but still trustees were appointed by the agreement, and for the benefit of the stockholders, and I cannot bring myself to think that it would be just to permit the mass of stockholders to exclude an individual stockholder from participation in the fund upon the ground that his title to shares standing in his name was defective when the trustees permitted that title to pass to him, and to remain in his name upon books kept by them for the purpose, this book being the only evidence of title.

The case in some respects is very like the case of the *Farmers and Mechanics Bank of Frederick and others vs. Wayman and Stockett*, decided by the Court of Appeals in December, 1847, 1 *Gill*, 336. In that case the bank had permitted certain shares of stock, held in trust, to be transferred by persons not

having authority to do so, to a *bona fide* purchaser without notice, and the court recognizing the validity of the title of the purchaser, decided that the banks should make good the trust fund, provided, it was not reimbursed by the parties who received the money from the purchasers. It was suggested in the argument that that case differed from this, because, in that, the question was supposed to be between the trustees and the purchaser, whilst in this it is between the purchaser and the stockholders. But the decision that the banks should make good the trust fund in that case, was of course, a decision that the stockholders should make it good, the latter being in effect the banks.

The ground of the decision was, that the banks having notice of the trusts with which the stock was clothed, and its officers being the trustees of the stockholders, could not, without making the bank responsible, by negligence or mistake, allow the title to pass by a transfer by any others than by those having competent authority to do so.

So in this case, the trustees were the trustees of the stockholders, and if they suffer stock to be transferred to a *bona fide* purchaser, without notice, by a person not having authority to make the transfer, the loss, in a contest between such purchaser and the stockholders ought to fall upon the latter. This appears to me the clear equity of the case, and I shall so order.

The petitions and exceptions also object to the allowance to the administrator of B. I. Cohen, and as by the agreement it is admitted, that this exception is well taken, the costs of the petition and exceptions will be allowed.

THOS. G. PRATT, for Exceptants.

R. W. GILL, for Cohen.

GEORGE W. MATTHEWS ET AL

vs.

WILLIAM D. MERRICK.

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MARCH TERM, 1848.

[PRACTICE IN CHANCERY.]

THE process of *subpœna scire facias* is the proper and appropriate proceeding to revive a decree which has abated by death, or where a female complainant has married, or the decree has become dormant by lapse of time.

A promise to allow a defendant a credit upon a decree against him by which he was induced to waive his right of appeal, rests upon a good and valid consideration.

An unqualified offer by complainants to allow the defendant a credit upon a decree in their favor, which offer was the result of negotiations previously had between the parties to settle the matters in dispute, in a friendly manner, cannot afterwards be withdrawn by them.

[The facts of this case are sufficiently stated in the Chancellor's opinion.]

THE CHANCELLOR :

I do not think the objection taken to the form of the proceeding adopted in this case can be sustained.

The process of *subpœna scire facias* appears to be the proper and appropriate proceeding to revive a decree which has abated by death, or where a female complainant has married, or the decree has become dormant by lapse of time. 1 *Bland*, 545; 3 *Bland*, 326.

Upon the merits of the case, however, there is certainly some difficulty, though I am of opinion that to some extent at least the merits are with the defendant, and that he is entitled to a credit upon the decree.

It appears that two bills were filed in this court against the defendant on the 2d of August, 1833. In one he was called upon to account as the executor of Rose Matthews, and in the other as administrator, *de bonis non*, of Luke F. Matthews, and the parties, complainants for the most part, were the same. Luke F. Matthews and Rose Matthews were the father and mother of the complainants, and the defendant was their brother-in-law, having married their sister.

The cases appear to have been prosecuted *pari passu*, and were brought to hearing before the Chancellor on the same day, to wit, on the 2d of August, 1841, when decrees were passed dismissing the bill against the defendant, as executor of Rose Matthews, with costs, and in the other case decreeing the payment by him of certain sums of money to the several complainants, and the costs of the suit. /

From the report of the Auditor in the case against the defendant, as executor of Rose Matthews, it appeared that he had overpaid the estate the sum of \$920 10, and this report was ratified by the decree which dismissed the bill.

An appeal was taken in due time by the defendant in the other case, and an approved appeal bond filed, but for some unexplained reason, in reference to which we can only speculate, the appeal was not prosecuted, and was abandoned.

No further steps appear to have been taken in the case until the 16th of November last, when petitions were filed praying for writs of *subpoena scire facias* to revive the decree.

Upon the answers to these petitions the question arises, which is now to be considered. These answers allege, that on the 20th of December, 1844, and subsequent to the decree, the complainant, William Matthews, for himself, and as the duly authorized agent and representative of the other parties, stipulated and agreed with the defendant that he should receive a credit on the decree against him for the sum which he had overpaid on account of the estate of Rose Matthews. The evidence relied upon in support of this pretension is to be found in a letter from the complainant, William Matthews, to the defendant, dated the 20th of December, 1844.

It is quite apparent from this letter that the subject of settling these controversies by friendly compromise had been previously discussed between the parties. The writer, in combating the claim of the defendant to be allowed interest on his overpayment, says, in substance, that he does no more than justice sanctions in insisting upon his first proposition, that is, to allow the \$920 10, without interest, the defendant paying the balance of the decree against him, with interest and cost. That his first

impressions inclined him to yield to the suggestions of the defendant to allow him interest on his overpayment, but upon further investigation, he had come to a different conclusion; and finally declares his own willingness, and the willingness of the other parties to settle, as first proposed, for the purpose of closing up the matter in a spirit of peace and harmony.

The question is upon the effect of this letter, its genuineness being admitted, and it being also admitted that the writer was a party to the original decree, and the solicitor and agent of the other parties.

When these negotiations commenced, and what influence they may have had in inducing an abandonment of the appeal, it is impossible to ascertain with any great degree of certainty, but it is very obvious that the parties did not consider the decree of August, 1841, as conclusively settling the questions in issue between them, and that for some reason or other, the defendant abandoned, or pretermitted the right which he had secured to have the decree against him reviewed by the appellate court. If these negotiations induced him to waive his appeal, then the promise to allow the credit which was the result of them, rests upon a good and valid consideration, and should be enforced. And I confess that looking to the relations of the parties, the character of the transactions out of which the claim arises, and the scope and tenor of the letter, the impression upon my mind is very strong that but for these efforts to bring about a friendly settlement, and the natural and praiseworthy desire to compromise a family controversy, the case would have been subjected to the revision of the superior court.

The argument for the counsel for the complainant, in which this credit is now resisted, insists that the offer to allow it was prompted by a desire to insure a speedy settlement of the claim, which object not being accomplished, the offer was withdrawn, and accordingly we find in the agreement attached to the letter, that prior to the filing the petition for the *subpœnas scire facias*, the authority of the counsel of the complainant to give the credit was revoked.

But the question is, had the complainants the right to do

this ? They do not in the letter referred to make the immediate payment of the residue of the claim a condition precedent upon which the credit was to be given, and their neglect or forbearance from that time until 1847, nearly three years, to take measures to coerce payment of the decree is strong to show that no such implied condition was intended. If the complainants had designed to affix a condition to their proposition to allow this credit, they should have said so, and then the other side would have known precisely the ground upon which they stood. But this was not done, and he rested and reasonably rested upon the well grounded confidence that the credit would be allowed him, and the forbearance of the complainants to press the payment of the residue of the claim was well calculated to assure him that his understanding in regard to the proposition was their's likewise. The letter in question refers to the former proposition of the plaintiffs to allow this credit, and insists upon this proposition, rejecting at the same time the defendant's pretension to be allowed interest upon the credit. This, then, in the discussions between these parties was plainly the complainants' view of the merits of the question, whilst the defendant was contending for a larger credit, and contending too, as it would seem from the letter, with good prospects of success, for the writer admits that at one time he was impressed with the justice of the defendant's view of the subject. The letter is, in my opinion, an unqualified offer to allow the credit in question, and I strongly incline to think is not merely gratuitous, but founded upon a consideration which entitles it to the favorable consideration of the court.

THOS. S. ALEXANDER, for Complainants,
A. RANDALL, for Defendant.

HENRY H. BROWN
 vs.
 ROBERT STEWART AND OTHERS.

ROBERT STEWART
 vs.
 HENRY H. BROWN.

MARCH TERM, 1849.

[SETTLEMENT—COMMISSIONS TO ADMINISTRATORS—EVIDENCE—LIMITATIONS.]

A SETTLEMENT between parties accompanied by a sealed obligation of one to pay the balance found due by the settlement, must be regarded as concluding all antecedent transactions between the parties, unless it can be shown by proof that it was founded upon mistake or was procured by fraud.

Agreements transferring the right to administer upon an estate to a third party, in consideration of receiving from such party the commissions, are against the policy of the law.

But an agreement between two parties, both equally entitled, that a joint administration shall be taken out, and that as the principal labor and responsibility was to be borne by one, the other would be content with such portions of the commissions as his associate should think he deserved, is valid.

Where there are two executors, both are equally entitled to commissions, and, in the absence of any express agreement, neither can deprive the other of his share, upon the ground that the party claiming the whole has performed the entire labor of settling up the estate, but by an *agreement inter sese* they may provide for an unequal division of the commissions, or that one shall have the whole.

It may be shown by parol evidence which of two parties to a pecuniary obligation, binding upon both, is the principal debtor, so as to adjust the equities as between themselves.

The act of limitations does not apply to the claim of one of two administrators, against the estate of his intestate ; he cannot sue himself at law.

[A statement of the facts of these cases and of the allegations of the bills and answers will be found in 1 *Md. Ch. Decisions*, 87, where the first opinion of the Chancellor is reported. Thos. R. Cross, the party upon whose estate Brown & Stewart jointly administered, was the father-in-law of each. The proceedings in the case subsequent to the filing of the opinion previously reported, are sufficiently stated in the following opinion of the Chancellor.]

THE CHANCELLOR:

By an agreement, filed on the 3d of February last, these cases are to be consolidated and the testimony and exhibits taken and filed in the two cases, are to be used indiscriminately in each.

But the cases though thus blended and argued together, must, to some extent, be considered separately, as there are questions which are not common to both, and which must be kept distinct to avoid confusion.

The substance and the object of the bill filed by Brown was stated in the opinion delivered by this court on the 12th of October last, when it was said that the settlement between him and Stewart, of the 21st of December, 1843, must be regarded as concluding all antecedent transactions between the parties, unless it could be shown by evidence, to have been founded upon mistake or to have been procured by fraud, (see 1 *Md. Ch. Decisions*, 87,) and the question, therefore, now is, confining our attention for the present to the case instituted by Brown, whether Stewart has succeeded in showing either mistake or fraud in the obtention of that settlement.

The injustice of which Stewart complains is, that he was not in that settlement credited with a full moiety of the commissions allowed to Brown and himself as administrators of Thomas R. Cross, in their account, which was passed on the 3d of January, 1843. In that account there was allowed the accountants the sum of \$785 96, whilst in the settlement referred to, the last credit in which is under date the 12th of November, 1842, Stewart is credited with only \$200 on account of commissions.

The counsel of Stewart insists, that as this credit preceded in point of time the allowance of commissions by the Orphans Court, it is to be regarded as a mere conjectural estimate of the commissions, and to be corrected when the actual amount should be fixed by the Orphans Court.

Such, however, does not appear to be the character of the credit as displayed upon the face of the paper. On the contrary, looking to the language in which the credit is expressed there is every reason to suppose it was the sum definitely fixed

and agreed upon by the parties. And although the credit is entered on the 12th of November, 1842, prior to the allowance of commissions by the Orphans Court, the single bill of Stewart appended to the settlement, and given for the balance ascertained by it to be due, bears date on the 21st of December, 1843, upwards of eleven months after the allowance. In addition to this, it appears by a paper proved to be in the hand writing of Stewart, and dated on the 23d of the same month and year, that to secure the payment of the same precise sum he conveyed to Brown, by a bill of sale, certain articles of agricultural produce, which, notwithstanding he, Stewart, afterwards sold.

Now it is said, that though Stewart, in this solemn and authoritative manner recognized his indebtedness to Brown in the sum fixed by the settlement, and that although he did this after he knew or certainly had the means of knowing the amount of commissions allowed by the court, that still he is not to be concluded, but may now open that settlement, and show it to be erroneous with respect to transactions and proceedings which had occurred before he signed and sealed instruments acknowledging his indebtedness, in the sum in question, in the most obligatory form known to the law.

No attempt has been made to impeach the settlement on the ground of fraud, and I can see nothing in the evidence to show that these instruments were executed under the influence of mistake. The only witness who speaks upon the subject of commissions is Mr. Camden, and if he is to be credited, and there is nothing in the cause upon which a suspicion of his veracity can be founded, the amount of compensation to be paid by Brown to Stewart for such services as he might render as one of the administrators, was referred exclusively to the discretion of the former.

Conceding the agreement between these parties to be proved, it is supposed it is obnoxious to the remarks of the Court of Appeals, in the case of *Owings vs. Owings*, 1 *Har. & Gill*, 484, in which agreements transferring the right to administer upon an estate to a third party, in consideration of receiving from

such party the commissions, is condemned as against the policy of the law. It does not appear to me, however, that the agreement between these parties, as proved by the witnesses, falls within the principle, or is of that class of agreements which the court said should not be encouraged.

It is not a contract made by a party entitled to the administration by which he agreed to surrender his right to another in consideration of his receiving from the latter the commissions which might be allowed for settling the estate, but it is an agreement between two parties, both equally entitled, that a joint administration should be taken out, and as the principal labor and responsibility was to be borne by one of them, the other would be content with such portion of the commissions as his associate should think he deserved. There is, therefore, in the agreement between these parties nothing which should expose it to the censure which the Court of Appeals considered would attach to a contract, by which a party entitled to administer on an estate undertakes to sell that right for the commissions.

This is no sale of the right to administer, but a mere agreement between parties, entitled by law to administer, by which one of them, upon a consideration, deemed by him at the time to be adequate, stipulated that he would be satisfied with such compensation as his associate might think proper to allow him. I can see nothing in such an agreement which should induce the court to disregard it as at variance with the policy of the law, and likely to result in pernicious consequences.

Neither is this contract between these parties in opposition to the case of *Richardson vs. Stansbury*, 4 Har. & Johns., 275, in which the Court of Appeals decided, that one executor was bound to give his co-executor his share of the commissions, though the latter may have left all the labor to be performed by his colleague, as in that case, no agreement was shown to have been entered into between the parties. The case simply decides, that as the executors are equally entitled to the commission, neither can deprive the other of his share upon the ground that the party claiming the whole has performed the entire labor of

settling up the estate. But the case does not decide, or profess to decide, that the executors may not *by agreement, inter se*, provide for an unequal division of the commissions, or even that one of them shall have the whole.

Upon this part of the case, therefore, I am of opinion, that the defendant, Stewart, has not succeeded in showing mistake or imposition in the settlement between him and Brown, and that there is nothing which can upon legal grounds affect the validity of that settlement, the mortgage which was given to secure the payment of the sum ascertained by it to be due, must be enforced either by selling the property remaining unsold or by appropriating to the payment of the mortgage debt the money now in bank arising from the sale of a portion of the mortgaged property.

The questions presented by the bill filed by Stewart remain briefly to be considered.

With respect to his claim to a distributive share of the estate of Thomas R. Cross, in the right of his wife, his right to an account is not understood to be contested, and the only question, therefore, in controversy upon this bill has reference to the claim of McKenna & Company, for which it is alleged the estate of Cross is primarily responsible, though the debt as shown by the proof was originally contracted by Stewart.

This debt was founded upon a joint and several single bill, executed by Stewart and Cross, to McKenna & Company, in January, 1838, to secure a debt due from Stewart to the obligees, as shown by the complainant's own proof; but an attempt is made to show that though the debt was the debt of Stewart, Cross was bound to pay it, and contracted so to do, in consideration of an indebtedness from him to Stewart. And that Cross having failed to make such payment as agreed, and the money having been paid by Stewart, he is now entitled to look to the estate of Cross for reimbursement. The evidence shows that after the death of Cross, separate suits were brought by McKenna & Company against his administrators, and Stewart as surviving obligor, and judgments recovered at April term, 1842, and that the money was paid by Stewart in the summer and fall of 1843.

The witness chiefly relied upon to prove that Cross was in truth the principal in the obligation to McKenna and Company, is Charles Griffith, who says that when the instrument was executed, Cross admitted there was some unsettled business between him and Stewart, and that he offered to sign first, remarking, if he signed first it would make him principal, and the witness understood from the conversation of the parties that Cross was to pay the debt for Stewart, but the witness did not hear Cross say why he was to pay it. It was also proved by John H. Brown that Cross told him that he intended to pay the debt due from Stewart to McKenna and Company; that he was indebted to Stewart, and thought it was his duty to do so.

This proof is unquestionably calculated to produce a presumption that as between Cross and Stewart, the former was the principal debtor in the obligation to McKenna and Company, and but for some other circumstances which are scarcely reconcilable with this state of things, it would be extremely difficult to resist the conclusion. Exceptions have been filed by the solicitor of Brown to this proof upon the ground that it is an attempt to prove by parol the liability of Cross to pay the debt of another, which cannot be done. The proof, however, does not appear to me to be exposed to this objection. It is not an effort to show by parol evidence the liability of one party for the debt of another, but to show by such proof which of two parties to a pecuniary obligation binding upon both is the principal debtor, so as to adjust the equities as between themselves, a thing of common occurrence in this court.

But the circumstance which, in my judgment, militates most strongly against the conclusion which Stewart seeks to establish by his proof, is the time which he has suffered to elapse before he brought this claim forward. The debt to McKenna and Company matured in 1840, the year in which Cross died. Suits were brought against his administrators, of whom Stewart was one, and against himself individually, and judgment was recovered in 1842, and the money paid by him in 1843, and yet it is not until 1847, four years subsequently, that he sets it up as a claim against the estate of Cross. In answer to this im-

putation of delay, it has been said that Stewart had no motive to press his claim against the estate of Cross, so long as Brown forebore to proceed against him upon the mortgage, his purpose being to set one off against the other. But these claims were not of that character that one could be set off against the other, and if they could, it seems strange that Stewart should be willing to leave the business open so long, Brown holding his sealed obligation, secured by mortgage, and he having nothing whatever to establish his right to a set-off, his title thereto, and of course his only security resting upon the memory of witnesses who might die or be absent or forgetful.

Still, it is possible that this is to be attributed to his negligence, and not to a consciousness of the infirmity of his claim, and, therefore, I am not disposed at this time to press the presumption too strongly against him, but will leave this question open to be reported on by the Auditor, and will give the parties leave to take further testimony before him, or before a justice of the peace in the usual way.

That limitations is no bar to this claim, is shown by the case of *State, use of Stevenson vs. Reigart*, 1 *Gill*, 1 and 32.

The counsel may prepare a decree in conformity with these views.

A. RANDALL, for Brown.

STOCKETT and ALEXANDER, for Stewart.

Note by Reporter.—The agreement referred to by the Chancellor as being considered obnoxious to objection by the Court of Appeals in the case of *Owings vs. Owings*, 1 *H. & G.*, 492, was, where a widow *declined* to administer on her deceased husband's estate, and permitted the brother of the deceased to obtain such letters, upon consideration that he would pay her all the commissions which should be allowed him by the Orphans Court. In the case of *ex parte Young, adm'x of Young*, 8 *Gill*, 285, the court say, the right to administer *cannot be delegated*. Judge Frick, in delivering the opinion in that case, says: "The appointment and the rights of administrators are

regulated by law. The trust and confidence created by a testator in the selection of his executor is, in the case of an administration, *created by law*. The custodiariness in his relation to the person and estate of the intestate is distinctly designated, first, to prevent litigation about the possession, and secondly, for the 'security of the estate,' and under our testamentary system, *this right cannot even be delegated.*"

WILLIAM PETERS
 vs.
 JEREMIAH T. SPEIGHTS. } MARCH TERM, 1853.

[SALE OF VESSEL IN FOREIGN PORT—PRIMAGE—ALLOWANCE TO SEAMEN DISCHARGED IN A FOREIGN PORT.]

THE complainant and defendant were joint owners of a vessel, which sailed from Baltimore to San Francisco, the former owning three-fourths, and the latter one-fourth thereof. The defendant was also the master of the vessel, and when she sailed from Baltimore held a power of attorney from complainant to sell his share when she arrived in San Francisco. This power and authority the complainant afterwards, and before the vessel arrived at her destination, revoked and transferred the same to other parties, his agents in San Francisco. These agents with the concurrence of defendant offered the vessel at public auction upon her arrival in San Francisco, and the defendant became the purchaser. **HELD—**

That under all the circumstances of the case the relation in which the parties stood at the time of the sale, did not preclude the defendant from becoming the purchaser of the vessel, the relation of trust and confidence between them having been destroyed by the complainant himself, by confiding the power to dispose of his interest in her to other parties.

The purchase of a ship in a foreign port by the master is generally to be considered as made for the benefit of the owners if they elect so to regard it; the incapacity of the master to purchase in such cases, arises from the relation of trust and confidence, which exists between him and the owners.

Primage is an allowance by the shippers to the master for his care bestowed upon their property on board the vessel, with which the owner of the vessel has no concern, and which the master receives to his own use, unless he has otherwise agreed with the owners.

As a general rule, a seaman is entitled to receive the whole of his stipulated wages for the entire intended voyage if he has faithfully performed his duty, and no disaster has rendered his services unproductive to his employer, but this rule as a general thing is inapplicable to the master.

[The allegations of the bill and the answer in this case will be found stated in 9 *Gill*, 472, where the appeal from the order of Baltimore County Court, in the equity side of which the bill was filed, overruling the motion to discharge the receiver, was affirmed, and the cause remanded for further proceedings. It was subsequently removed to the Court of Chancery. The evidence and the other proceedings in the cause are sufficiently stated in the following opinion of the Chancellor.]

THE CHANCELLOR :

The facts alleged on the one side, and the other by the pleadings in this case are sufficiently stated in the report of the cause in 9 *Gill*, 472, upon the appeal from the order refusing to discharge the receiver, and need not be again repeated. So far as the opinion then delivered by the Court of Appeals is applicable to the case as it now stands, this court, of course, deems itself bound to conform to it.

I understand that opinion to have decided that these parties in the adventure which has given rise to the present controversy were partners, and that the partnership was dissolved by the sale of the vessel at San Francisco in August, 1850. In speaking of the conduct of the defendant as developed by the pleadings and proofs in the case at that time, the court, avoiding the expression of an opinion which should control the ultimate decision of the cause, say, that in the transactions at San Francisco he acted precipitately, and under great excitement, for which, however, they intimate there was provocation. That he assented to, if he did not coerce, a sacrifice of the vessel. He bought the vessel himself, and the agent of the plaintiff, in his testimony, charges him expressly with precipitating the sale before the cargo was discharged. Yet the fair character of the purchase, and the price paid seems to be fully sustained by other testimony, though he sold the vessel soon after for twice the amount, and the court then expressly waive, at that stage of the cause, the decision of the question touching the effect upon the sale of the fiduciary relation which has existed between the parties.

A good deal of evidence has been taken on both sides since

the cause was remanded for further proceedings by the Court of Appeals, and this proof, with all the proceedings, has been carefully considered, and the conclusion to which I have come is, that under all the circumstances of the case, the relation in which the parties stood at the period of the sale of the vessel, in August, 1850, did not preclude the defendant from becoming the purchaser of the vessel.

It is quite evident from the second letter of the defendant, under date the 15th of August, 1850, that it was written under high excitement, and there are expressions in it indicative of a determination to sell the vessel at once at any price. But in my opinion it is equally clear, from the proof now in the cause, that Messrs. Winter & Latimer, the parties who held the letter of attorney from the complainant to sell his interest in her, were quite as much if not more to blame (if blame be imputable to any one) than the defendant, for bringing her into market at the time and in the mode in which she was sold.

That they could have controlled the sale at that time is manifest, and though Latimer in his proof speaks of the time and mode selected as injudicious, there is no intimation anywhere that they communicated their opinion upon the subject to the defendant. When the defendant left the port of Baltimore, he held a power of attorney from the complainant to dispose of his interest in the vessel. After his departure, from some unexplained cause, the complainant chose to delegate this authority to Mr. Lippincott, who transferred the power to Winter & Latimer, and the evidence of Mr. Cannon, the auctioneer who made the sale, is explicit that it was made by order of that firm. There can certainly be no doubt that the defendant not only concurred in but pressed the sale on, but I am far from thinking that all the consequences resulting from disposing of the vessel at that time, and in the mode selected, should be visited upon him, when it is undeniable that the parties who held the letter of attorney of the complainant never intimated to him a doubt of the propriety of disposing of the property in that way, and at that time, but, on the contrary, gave the auctioneer orders to make it.

If the complainant had permitted the power which he had given the defendant to stand unrevoked, and in the exercise of the authority thus confided to him, he had acted precipitately or unwisely, or at all events had attempted to make profit to himself in the discharge of his trust, there can be no doubt a court of equity would have afforded redress to the injured party. But when this authority was withdrawn, and the power entrusted to another party, it would certainly be a hard measure of justice to hold the person from whom the power was taken responsible for the conduct of him to whom it was given.

Winter & Latimer were the agents of the plaintiff in making this sale, and they, knowing who was the purchaser, received the purchase money from the auctioneer employed by them without objection or complaint. This appears from the evidence of the auctioneer, and the entries upon his books returned with the commission.

I cannot conceive that the defendant should or can, with any propriety, be regarded as the complainant's agent in selling this vessel, and, therefore, it appears to me there is no principle of law which precluded him from purchasing. I am also quite satisfied that if he had not attended the sale and bid, she would have sold for less than he gave for her, thus inflicting an injury upon himself as well as upon the complainant. Surely there can be no rule of law which would require him to stand by and permit his own property to be sacrificed under such circumstances.

It is no answer to say, that he might have bid on account of himself and the complainant to prevent a sacrifice. He had no authority from the plaintiff to do so, and might at the election of the latter been held to his bid.

The counsel for the complainant has pressed with much force the circumstance that the vessel was in bad repute in the place of sale, and that the respondent is responsible to some extent for this. But I do not find in the evidence anything to lead to a suspicion that the defendant contributed to or even knew of the reports in circulation injurious to the character of the vessel, and, therefore, he cannot be affected by their existence. It is very certain that but for the defendant's going to the place

of sale and bidding, the barque would have sold for less than she actually brought. That she subsequently commanded a much better price is conclusively shown to have resulted from a circumstance which could not have been foreseen.

The cases relied upon to show the invalidity of the purchase of this vessel by the defendant, do not, in my opinion, support the proposition for which they are cited. In the case of *Church vs. The Marine Ins. Co.*, 1 *Mason*, 341, the vessel was sold by the master himself at public auction, after she was stranded, and he became the purchaser. There, as said by Mr. Justice Story, nothing could be clearer than that he could not become a purchaser. He was both vendor and vendee. In the case of the *Schooner Tilton*, 5 *Mason*, 465, the same judge, speaking of sales made by a wreck commissioner, and asserting their incapacity to purchase, says, the same principle applies with as much, if not more force to the master, when he acts as the agent of all concerned, under an authority superinduced by an urgent necessity in the course of the voyage. Even after the sale the conduct of the wreck commissioner or the master, in buying from the first purchaser, will be watched with suspicion, and nothing but the most entire good faith, *uberrima fides*, on their part, will save the sale.

And the case of *Chamberlain vs. Harrod*, 5 *Greenleaf*, 420, is merely an affirmance of the admitted principle that the purchase of a ship in a foreign port, by the master, is generally to be considered as made for the benefit of the owners, if they choose so to regard it. The incapacity of the master thus to purchase, arises, say the court, in this last case, "from the relation of trust and confidence which exists between them." But in the case now under consideration, the relation of trust and confidence did not exist. That had been destroyed by the complainant himself, when he thought proper to confide the power to dispose of his interest in the vessel to another. And although it may be said that the defendant was in favor of and even urged the sale, yet there can be no doubt, I think, that Winter & Latimer, the complainant's agents, must be regarded as the parties by whom it was made, and that whatever they

may have thought of the expediency of selling at that time, and in the mode adopted, they did not give the defendant the benefit of their greater experience and knowledge on the subject.

Some circumstances have been relied upon to show that the defendant, even after the purchase on the 26th of August, 1850, did not regard the vessel as belonging to him, such for example, as hiring seamen and charging their wages to the joint concern. This, certainly, he had no right to do, but I cannot persuade myself he meant by it to show or admit that he did not claim to be the exclusive owner of the vessel after the sale. He paid the purchase money to Winter & Latimer, the plaintiff's agents, and resold without any consultation with them.

I do not think, therefore, the complainant has a right to treat the first sale as a nullity and to participate in the profits upon the resale.

The next question relates to the right of the defendant to charge commissions on the freights collected by him in San Francisco.

The evidence of Holmes, the clerk of the complainant, is directly opposed to any such charge, and that of Nicholson, one of the former joint owners of the vessel is equally explicit upon the point, during the period of his ownership. This proof, in my opinion, is sufficient to overrule the answer. It is true, the evidence of Nicholson does not relate to the voyage to San Francisco, but it may, I think, be referred to in corroboration of the proof of Holmes, which is positive and unequivocal that the defendant, for his services upon this identical voyage, was to receive no compensation beyond his pay, which was to be at the rate of fifty dollars per month. The agreement on the part of the defendant to make no charge for his services in the foreign port, was founded on a valuable consideration, as shown by Holmes. This consideration was a corresponding agreement by the complainant to charge nothing for his services as agent and ship-husband in Baltimore, a stipulation which he faithfully complied with, it appearing by the proof that he collected

freight in Baltimore amounting to upwards of five thousand dollars, and made disbursements exceeding four thousand dollars, for which he made no charge. Under these circumstances the defendant cannot be allowed to charge as against Peters any thing for his services on the voyage, or at San Francisco, in collecting freights beyond his pay as master of the vessel.

But I do not understand the agreement to have any thing to do with the charge of primage. This is a matter between the master and the owners of the merchandise shipped on board the vessel. The word primage, says *Abbott on Shipping*, 492, "denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners." His agreement with the complainant, in this case, was, that they, master and owner, reciprocally should make no charge, the one against the other, for services in the home and foreign port, but it cannot be understood as extending to a small compensation to the master for his care and trouble bestowed upon the property of the shippers on board the vessel with which the owner had no concern. The master, to be sure, has no right to bring this charge into the accounts between himself and the complainant, and if he has done so, they must, in that respect, be corrected.

The opinion of the court is also asked touching the defendant's right as master of the barque to charge for his pay as such to the period of his return to Baltimore, and for his expenses incurred in returning. The case of the master is unlike that of the seaman. The latter, as a general rule, is entitled to receive the whole of the stipulated reward for the entire intended voyage, if he has faithfully performed his duty, and if no disaster has rendered his services unproductive to his employer; but the rule, as a general thing, is inapplicable to the situation and character of the master, and the act of congress of the 28th of February, 1803, ch. 62, which, when the seamen are discharged abroad with their own consent, or the ship is sold, provides that three months additional pay shall be allowed, does not embrace the case of the master. *Abbott on Shipping*, 619.

There is nothing in this case to exempt the master from the operation of the general rule. In the sale of the vessel he concurred and himself became the purchaser, realizing a large profit upon the resale, and though I think the sale was, in a measure forced upon him by the conduct of the complainant, and that it was made by the agents of the latter, still his willingness, under the circumstances, that it should take place, and his buying himself, is quite sufficient to deprive him of the title to pay after that period, if under a different state of facts the rule with regard to seamen would be applicable to him.

My opinion, therefore, is, that his claim to wages as master of the vessel, must terminate with the sale in August, 1850, when he became the purchaser. That from that time all the expenses of the vessel must be borne by him, and that as all connection between him and the complainant was then dissolved, he must defray his own expenses home.

The case will be sent to the Auditor to state an account, in conformity with the views hereinbefore expressed.

S. T. WALLIS, for Complainant.

CHAS. F. MAYER, for Defendant.

JOHN T. HODGES	}	MARCH TERM, 1847.
vs.		
VACHAEL SEVIER AND WIFE.		

[JUDGMENT LIEN—PRACTICE IN CHANCERY.]

WHERE three years have elapsed after the rendition of a judgment, and no *fiat* has been entered upon the *scire facias*, the judgment must be presumed to be satisfied, or at least not in a condition to be enforced at law.

Where mortgaged property has been sold under a decree of this court, and a judgment has been rendered against the mortgagor, prior to the mortgage, which had become dormant by lapse of time, and no *fiat* had been entered upon the *scire facias* to revive it, the judgment creditor cannot, in such condition of his judgment, contest with the mortgagee, in this court, the application of the proceeds of the sale of the mortgaged premises.

[The facts of this case are fully stated in the following opinion of the Chancellor.]

THE CHANCELLOR :

On the 13th of November, 1844, the complainant filed his bill for the sale of certain premises which had been mortgaged to him by Sevier and wife, by deed bearing date on the 17th of May, 1843, to secure the payment of the sum of \$4000, due Hodges, for moneys advanced by him to Sevier, to pay a debt to one Mackubin, contracted for the purchase money for a tract of land called "Griffith's Land Resurveyed," purchased by Sevier from Mackubin. The mortgaged premises consisted of this tract and also of two houses and lots in the city of Annapolis.

It appears by an amended bill filed on the 16th of September, 1846, that Sevier, after the date of the mortgage, conveyed his equity of redemption to one Gabriel H. Duvall as his insolvent trustee, the amendment being made for the purpose of charging this fact and making the trustee a party.

Sevier and his wife, and Duvall, admitted the facts charged and consented to a decree which passed accordingly, on the 18th of January last, appointing a trustee in common form to make the sale. The trustee reported his sale on the 19th of February following, amounting to \$4697, upon which the usual order of ratification, *nisi*, has been passed, the case not having yet been submitted for the final ratification of the sale.

In this state of the proceedings, Joseph J. Speed and Josias Pennington, by their petition, filed on the 29th of April, stated and showed themselves by the production of a short copy, to be judgment creditors of said Sevier, upon a judgment rendered in the Anne Arundel County Court, at October term, 1840, for \$300 and costs, upon which an execution had issued to April term, 1841, and according to the return of the sheriff, partially satisfied, and "*nulla bona*" returned as to the residue. It further appeared, that the plaintiffs in said judgment, had caused a *seire facias* to be issued upon it to October term, 1845, to which, at that term, the defendant, Sevier, appeared, and that

case now remains open upon the docket, no *fiat* having been entered.

The petitioners insist that their said judgment is a lien on the money produced by the sale of the trustee, and entitled to be paid in preference to the mortgage, and they, therefore, pray that the trustee may be compelled to bring the money into court that it may be so applied. In addition to this relief, the petitioners prayed that the sheriff's return, that he had made a part of the debt, might be corrected, upon the allegation that said return was false.

The matter of this petition was ordered to stand for hearing on notice to the complainant, Hodges, and having been argued by the solicitors in writing, is now to be decided.

The original judgment, it will be perceived, bears date prior to the mortgage, and upon this ground the preference claimed for it is insisted upon, and authorities are cited to show that in a proceeding like the present, the proceeds of property sold under the authority of this court will be applied to the payment of liens in the order in which they were created. The Chancellor does not deem it necessary to state what his opinion would be, if the judgment in question had actually been revived in the court in which it was rendered. In the case of *Coombs vs. Jordan*, 3 *Bland*, 324, the late Chancellor decided that a judgment revived by *scire facias* after the time allowed for suing out execution only operates prospectively, and not with any retrospective effect, so as to overreach intermediate incumbrances or alienations, though as between the parties to the judgment, it may operate as a lien from its date. The same question came before the Court of Appeals in *Murphy vs. Cord*, 12 *G. & J.*, 182, and though no opinion was delivered, it is inferrible from the judgment rendered by the court, that the doctrine of the Chancellor, in *Coombs and Jordan*, would not receive the sanction of the appellate tribunal.

But in the present case, the petitioners have not obtained a *fiat* upon their judgment, and it does not become this court to say whether they will be able to do so or not. It is manifest that standing upon their judgment of 1840 they are precluded from insisting upon their lien or proceeding to enforce payment

in any way, because the presumption from lapse of time is, that the judgment has been executed or satisfied. In the case of *Mullikin vs. Duvall*, 7 *Gill & Johns.*, 358, the Court of Appeals say, that a suspension of final process on a judgment for three years, in this state, renders a *scire facias* necessary before further process can be obtained upon it. And on the next page, it is said, "after the year and a day (in England) the law presumes the judgment to be executed, or satisfied, and, therefore, it is that the plaintiff is put to his *scire facias* to revive the judgment, to which the defendant may appear and plead in the same manner as to an action founded on an original writ."

The judgment of these petitioners, then, as it now stands, must be presumed to be satisfied, or at all events, is not in a condition to be enforced at law, and, therefore, it is not perceived upon what principle they can in this court contest with the complainant the question of the proper application of the money arising from the sale of the mortgaged premises in this case. It is not for this court to say, whether the judgment will or will not ever be revived, and if by an order of this court the proceeds of the property sold by the trustee, should be applied to its payment, and the County Court should hereafter, in the case growing out of the *scire facias*, give judgment for the defendant, Sevier, a very great wrong would be done. It is the opinion of the Chancellor, that waiving the other questions, drawn into discussion by the counsel on either side, a sufficient reason has been given for refusing the prayer of the petition, which must consequently be dismissed.

Note by Reporter.—The subsequent proceedings in this case, are reported in the case of *Duvall vs. Speed*, 1 *Md. Ch. Decisions*, 229. Though no opinion was filed in the case of *Murphy vs. Cord*, 12 *Gill & Johns.*, 182, referred to by the Chancellor, in the above opinion, yet when that case was cited in the argument of the case of *Doub vs. Barns et al*, 4 *Gill*, 11, *Judge Chambers* said, it was the decision of the Court of Appeals in that case, and if an opinion had been filed would have been expressed.

"1. That the lien of the judgment was not lost with the right to issue an immediate execution as had been announced by the Chancellor, in 3 *Bland*, 298, and the lien remained for twelve years.

"2. That when the debtor alienated lands, subject to the lien of a judgment, before the right to issue an immediate execution was suspended, that is, within three years from the date of the judgment a *scire facias* was unnecessary to affect the terre-tenants.

"3. But where a *scire facias* was necessary to revive the judgment, whether by death or lapse of years, it was necessary against all the terre-tenants, whose lands were to be affected by the judgment."

These propositions were assented to by all the judges present at the argument of the case of *Doub vs. Barns*, consisting of *Archer, C. J., Dorsey, Chambers, Spence and Magruder, J.*

A. RANDALL, for Complainants.

JAMES STEELE, for the Petitioners.

ARTHUR PUE

vs.

HENRY H. PUE.

}

SEPTEMBER TERM, 1848.

[RIGHT OF WAY—PRESCRIPTION—PRACTICE IN CHANCERY—EVIDENCE.]

A PRIVATE right of way over the lands of another must be founded either on grant or by prescription which supposes a grant.

A user of a right of way for twenty years, exercised adversely and without any thing to qualify it, will afford sufficient ground for the presumption of a grant. But if the enjoyment can be referred to the leave or favor of the party over whose lands the right of way is claimed, or can be placed upon any other footing than a claim or assertion of right, it will repel the presumption of a grant.

A right of way once established by prescription or by grant, cannot be extinguished by a parol agreement.

But where an attempt is made to make out a title by prescription founded upon an adverse and uninterrupted user for a series of years, it is competent

to the defendant to prove by parol that the user was the result of his leave and favor, and not of a claim of right in the other party.

The fact that complainant has parted with his title to the land since the filing of the answer, cannot be brought forward by the defendant by a supplemental answer; the proper mode is to file a bill in the nature of a supplemental bill, which is in the nature of a plea, *puis darrien continuance*, at common law.

[The bill in this case was filed to obtain an injunction restraining the defendant from closing a road over his lands, in which the complainant claimed a private right of way. The allegations of the bill and answer, and the substance of the evidence taken, are fully stated in the opinion of the Chancellor, delivered upon the hearing of the motion to dissolve. The defendant filed a supplemental answer, charging that since the filing of his original answer, the complainant had conveyed by deed all his right and title to the land mentioned in his bill, to a third party, whereby he had divested himself of all right to the privilege secured by the injunction. This answer, the Chancellor, for the reasons assigned in his opinion, ordered to be rejected and taken off the file.]

THE CHANCELLOR:

The bill in this case claims a private right of way over the lands of the defendant, which must be founded either on grant, or by prescription, which supposes a grant. No actual grant has been shown, or is alleged in the bill, and therefore, if the complainant is entitled to a continuance of the injunction which issued to restrain the defendant from closing up the road, and from interfering with the complainant in the use of it, he must establish his title by prescription.

A user for twenty years exercised adversely and without any thing to qualify it, will afford sufficient ground for the presumption of a grant, but if the enjoyment can be referred to the leave or favor of the party over whose lands the right of way is claimed, or can be placed upon any other footing than a claim or assertion of right, it will repel the presumption of a grant. *Wright vs. Freeman*, 5 H. & J., 467; *Woolrych on Ways*, 19.

The bill, in this case, alleges that the complainant, and those

under whom he claims, have, together, for greatly over twenty years, and for probably one hundred years or more, had the full, uninterrupted and complete use and enjoyment of a road from their farm over a parcel of land now occupied and owned by the defendant. This averment the answer explicitly denies, and affirms that no such right of way was ever had or claimed, and that the parties using the said road only had the permission of the owners of the farm now held and owned by the defendant, who have always kept up gates thereupon, and that he, the defendant, put up bars to keep in his stock, with the knowledge, and without any objection on the part of his father, under whom the complainant claims. That the father never claimed and exercised an adverse right of way, but that he at all times admitted the defendant's right to close up said road, and merely obtained his permission to use it during his lifetime.

This answer having removed the ground upon which the equity of the bill rested, an order was obtained to take depositions under the act of Assembly, and several depositions have been taken.

Some of the witnesses certainly do prove a user of the road in question for a period exceeding twenty years, and if the case rested upon their evidence alone, the requisite foundation would be laid for the presumption of a grant, and the plaintiff would be entitled to be protected in the enjoyment of the road.

But the denials of the answer in regard to the use of this road as a matter of right, and its assertion that its enjoyment was the result of the leave or favor of this defendant, granted to those under whom the plaintiff claims, is clearly and unequivocally corroborated by one witness, whose situation, with reference to the property and relations to the parties gave him peculiar means of obtaining correct information upon the subject. It is most manifest from the testimony of Charles H. Pue, who is the brother of the parties, that their father, under whom the complainant claims, did not pretend to a right to use this road adversely, but, on the contrary, that he fully recognized the authority of the defendant to shut it up if he chose

to do so. Assuming the truth of the evidence of this witness, and there is not the slightest ground to doubt the entire accuracy of his statement, and the idea of an adverse enjoyment of the right of way for twenty years, upon which the presumption of the grant must be founded, is entirely dispelled.

The testimony of the other witnesses, who speak of the use of the road for twenty years and more by those who have held the farm owned by the complainant, does not at all conflict with the proof of Mr. Charles H. Pue. There is, and can be, no doubt that the road has been so used, and so far as the witnesses have deposed, who were examined on the part of the complainant, this user was not qualified by any circumstance which would interfere with the presumption of a grant which the complainant seeks to establish; and if the case rested upon their evidence alone, I do not very well see how the presumption could be resisted. But it certainly, by no means, follows, because these witnesses are aware of no fact or circumstance showing the use of the road to have proceeded from the leave or favor of the defendant, that therefore no such fact or circumstance exists, or that because they never heard the father of the complainant say that the defendant had the right to close up the road, if he thought fit to do so, that therefore, he made no such declaration. That he did make such a declaration there is, and can be, no reason to doubt. And the conviction of the court upon this subject, by no means involves the slightest imputation upon the veracity of the other witnesses, who simply speak of the use of the road, for such use is quite compatible with the declarations referred to.

Here, then, is a case in which the complainant's title to the interposition of this court, by injunction, rests upon the presumption of the grant of a right of way, and that presumption, according to the authorities, can only be made from a user for twenty years, exercised adversely and without anything to qualify it. Such a case is made by the bill, but this the answer denies, and this denial is supported by a witness whose situation gave him peculiar means of knowing the views of the parties, and who stands before the court above all suspicion.

In opposition to the answer and this witness, the complainant has examined several gentlemen of the highest respectability, and although their testimony, if standing alone, might be sufficient to make out his case, it seems to me impossible to give it that effect when it is encountered by evidence with which it is perfectly compatible, but which must conduct the mind to an entirely different conclusion.

The counsel for the complainant has insisted that the evidence of Mr. Charles H. Pue, which merely speaks of conversations between the father of the complainant and the defendant, is not sufficient to extinguish the right of way, because such right cannot be extinguished by parol, and refers to the case in 5 *H. & J.*, 467, and other authorities, to sustain the position.

It is very true, that a right of way once established by prescription, (which presupposes a grant,) or by a grant, cannot be extinguished by a parol agreement, but this, by no means, proves that when an attempt is made to make out a title by prescription, founded upon an adverse and uninterrupted user for a series of years, that it is not competent to the defendant to prove by parol that the user was the result of his leave and favor, and not of a claim of right in the other party. I am, therefore, of opinion, that the injunction must be dissolved.

With regard to the fact which is said to have arisen since the filing of the original answer, and which the defendant seeks to bring forward by a supplemental answer, the authorities seem to show that it cannot be brought forward in that way. The proper mode in such cases is to file a bill in the nature of a supplemental bill, which seems to be a bill in the nature of a plea, *puis darrien continuance*, at the common law. *Story's Eq. Pl. sec.* 903; *Taylor vs. Titus*, 2 *Edw. Ch. Rep.*, 135; 2 *Daniell's Ch. Pr.*, 914, and note.

E. HAMMOND, for Complainant.

J. T. B. DORSEY, for the Defendant.

THOMAS. D. HURT AND OTHERS

VS.

JOHN STULL.

}

SEPTEMBER TERM, 1851.

[EFFECT OF INSOLVENT APPLICATION UPON PROCEEDINGS FOR A SALE IN THIS COURT—SALES BY TRUSTEES.]

A BILL was filed in this case by a vendor for the sale of a certain parcel of land to pay the vendor's lien, and a decree was passed accordingly, which upon appeal was affirmed by the court of appeals : after the decree, but before the sale had actually taken place the defendant, the vendee, applied for the benefit of the insolvent laws, and his trustee in insolvency was duly appointed, who applied to the court to stay execution of the decree upon the ground that by the proceedings in insolvency the right to make the sale is exclusively vested in the trustee of the insolvent. HELD—That the proceedings in insolvency did not put a stop to the proceedings of this court, and its trustee was still bound to execute the decree by a sale of the property.

In the execution of decrees for the sale of property, though this court employs a trustee, that officer is its agent, the court itself being the vendor acting through the instrumentality of its agent.

[The facts of this case are stated by the Chancellor in his opinion.]

THE CHANCELLOR :

This case is submitted upon the order of the 14th of August last, passed upon the petition of Albert T. Emory, trustee in insolvency of the defendant, Stull, and the proceedings and the written arguments of the solicitors of the parties have been read and considered.

It is an application by the petitioner to stay the execution of a decree of this court, passed for the sale of a parcel of real estate to pay the vendor's lien, after the affirmance of that decree by the Court of Appeals, and after the trustee, in conformity therewith, had advertised the property for sale. The ground taken in the petition is, that by the proceedings in insolvency the right to make sale of the property is exclusively in the trustee of the insolvent, and for this position, the case of *Alexander et al vs. Ghiselin et al*, 5 Gill, 178, 179, is relied upon.

It cannot be doubted that numerous cases have arisen since the passage of the act of 1805, ch. 110, the foundation of our insolvent system, and yet this, so far as I am informed, is the first instance in which an attempt has been made to arrest the proceedings of a trustee under a decree of this court upon the ground that the party against whom the decree passed had applied for the benefit of the insolvent laws. It must have happened in numberless instances that the mortgagor or vendee of real estate has become insolvent, and had a trustee appointed pending proceedings against him, or after a decree for the sale of the mortgaged property, or for the satisfaction of the vendor's lien, and yet it has never been supposed that such appointment put an end to the power of this court to proceed with the cause, or destroyed the authority of the trustee under the decree to carry it into execution.

In the case of *Glenn, trustee of Dorsey vs. Clapp*, 11 G. & J., 1, the Court of Appeals say, "it is a clear proposition that a suit in equity abates by the death of any of the parties materially interested, and that the insolvency or bankruptcy of a plaintiff or defendant renders the suit so far defective, that the trustee or assignee must be brought before the court." The language just quoted was used in a cause in which the mortgagor had become insolvent, and a trustee in insolvency had been appointed after a decree had passed for a sale of the mortgaged premises, and although it does not distinctly appear whether the sale of the trustee under the decree preceded or followed the application of the mortgagor for the benefit of the insolvent laws, the presumption from the facts which do appear is very strong in favor of the latter supposition. The sale was made on the 13th of March, 1834, and the trustee of the insolvent (the mortgagor) appeared in court on the 28th of the same month, and filed exceptions to the sale, not, however, upon the ground that the trustee appointed to carry the decree into execution had no authority to do so, after the trustee in insolvency had been appointed, but upon other and different grounds. It does not appear from anything in the report of the cause, nor from the language and reasoning of the court, that the sale

made under the decree could be in any way affected by the circumstance that the mortgagor had petitioned for the benefit of the insolvent laws after the decree and before the sale, as was probably the fact. On the contrary, it may be fairly inferred that no such consequence could be supposed to result from such a cause, or some intimation to that effect would most likely have fallen from the court.

The case of *Alexander vs. Ghiselin*, is a subsequent case, and if, by any fair construction of the reasoning of the court, when applied to the point actually decided, it can be made to embrace the question now under consideration, it must, of course, control it. But, in my opinion, this case is most clearly distinguishable from that, and there appears to me to be reasons of great weight why the principle adopted by the Court of Appeals in that case should not govern this.

This court, in the case now before it, passed a decree for the sale of a parcel of land to pay the lien of the vendor upon a bill filed by him. It was a proceeding *in rem*, and by the decree the land was condemned to pay the claim of the party who sold it, and in whom the legal title still remains. Although the court in the execution of this decree and others of a like nature employs a trustee, that officer is its agent, the court itself being the vendor, acting through the instrumentality of its agent. *Iglehart vs. Armiger*, 1 *Bland*, 527. In *Glenn vs. Clapp*, before referred to, in speaking of these sales the court say, "they are transactions between the court and the purchaser." The question, then, is, whether, after this court has undertaken itself to make sale of property within its jurisdiction, having for the benefit of all concerned assumed the character of vendor, the subsequent insolvency of the defendant shall arrest it and transfer the duty to other hands, and the subject of the proceeding to another jurisdiction?

Though near half a century has elapsed since the insolvent system was introduced, no case of the kind has occurred, or at least there is no trace of any such in the books, and it is confidently believed that none exists. The property in *Alexander vs. Ghiselin*, was to be sold by the sheriff and not by the court

The court in that case was not the vendor as it is in this, and I apprehend it would be attended with much inconvenience, if not mischief, to say that after this court has finally passed upon the rights of the parties, and has taken upon itself to sell the property for the benefit of him who is entitled, that the insolvency of the other party shall put a stop to its proceedings, and transfer the subject to other hands.

The petition, therefore, must be dismissed, and as according to the terms of the decree, the entire purchase money would have been due on the 1st of January last, if the proceedings of the trustee had not been arrested, I see no reason why the sale should not now be for cash. The decree does not direct that the different instalments shall become due in certain specified periods after the day of sale, but that six hundred dollars shall be paid on the day of sale, or on its ratification, six hundred on the 1st of January, 1850, and the balance on the 1st of January, 1851, so that the entire sum would have become due long since if the decree had been permitted to have its effect.

GEORGE VICKERS, for the Complainant.

EMORY, for Petitioner.

MACKALL HARRIS

vs.

JAMES A. SANGSTON AND OTHERS.

}

JULY TERM, 1849.

[INJUNCTION.]

UPON motion to dissolve an injunction upon bill and answer, the answer, when speaking responsively to the bill, must be taken as true, and if it denies the averment of the bill upon which the equity for the injunction rests, the injunction must be dissolved.

[The facts of this case are fully stated in the following opinion of the Chancellor, delivered upon the hearing of the motion to dissolve the injunction which had been granted upon the bill.]

THE CHANCELLOR :

This case, standing ready for hearing upon the motion to dissolve the injunction, has been argued by the solicitors of the parties, and considered by the court.

The injunction, which was not commensurate with the prayer of the bill, was, in the opinion of the Chancellor, warranted by the allegation that the Sangstons had agreed to stand in the place of Welch, and to give up and reconvey the land upon receiving from the complainant, the sum which they had paid Welch, with the interest thereon. The allegation of the bill being, that Welch, as the administrator of one Henry Lyles, had levied an execution upon the land in question, issued upon a judgment in favor of said Lyles against Alexander Harris, for a balance of the purchase money due said Lyles for said land from Alexander Harris, under whom the complainant claims ; that the amount so due Lyles from Alexander Harris was \$843, being the balance with interest and costs due on the judgment ; that Welch became the purchaser at sheriff's sale for that sum, agreeing with the complainant and Alexander Harris, that if they could procure any one to pay him said sum of money, he would agree to have the land secured to the complainant, and that James A. Sangston, at the request of Alexander Harris, and with the consent of his partners, did, out of the partnership funds, advance and pay said sum to Welch, and, in order to secure said sum according to the agreement, took a deed of the land from the sheriff to himself, and that at the time of the payment of the money and execution of the deed they all agreed to reconvey the land to complainant on payment to them of the said sum of money with interest, &c., but that since, in violation of this alleged agreement, they, the Sangstons, had sold the said land to Dr. George Dare for \$1885.

An injunction was granted to restrain the Sangstons from parting with the securities they might receive from Dare on account of the sale to him until the further order of the court.

The bill contains many other statements, but it was upon this allegation, and the imputed violation of the agreement that the injunction was ordered, and it, therefore, follows, that if this allegation is denied, the injunction must be dissolved.

In answering this part of the bill, the Sangstons say, that Alexander Harris, who was largely indebted to them, called upon them in June, 1846, and represented that this parcel of land had sold much below its value, but that the purchaser from the sheriff, would permit him to redeem it by a certain day, upon payment of the sum for which he bought ; that he, Harris, was unable to make the payment and that the lands would be so sacrificed unless they, the defendants, would advance the money. That he represented to them that they would get a clear title, and that as the lands would sell for three thousand dollars, it would not only furnish an ample security for the sum then to be advanced, but give them additional security for the pre-existing indebtedness of Harris to them, and that for the purpose of getting this additional security for their claim, and not for the purpose or under the agreement stated in the bill, of simply holding the land as a mortgage or security for the money so advanced, they made the advance, and took from the sheriff an absolute deed.

The answer then denies the gravamen of the bill, so far as the title of the complainant to an injunction is concerned, and in addition to the rule that upon a motion to dissolve an injunction upon bill and answer, the answer, when speaking responsively to the bill, must be taken as true, there can be no doubt that the answer in this case gives much the most probable statement of the transaction. That the Messrs. Sangstons should have made a cash advance in order to secure a pre-existing debt is very probable, especially when they were informed that the property of their debtor was about being sacrificed, but no adequate motive is shown for their conduct if they were merely to hold the property as security for the sum advanced, when the redeemed property was not to go back to their embarrassed debtor, but was to pass to another with whom there is nothing to show they had any relations of business or otherwise. This consideration need not be pursued, however, it being sufficient upon this motion that the answer explicitly denies the averment upon which the equity for an injunction rests.

But it has been insisted in the argument that as we are deal-

ing with the rights of Mackall Harris, the complainant, we should not be influenced by the agreement between Alexander Harris and the Sangstons. The bill, however, alleges that the money was advanced by them at the request of Alexander Harris, and that at the time of such advance and execution of the deed to them, they all agreed to reconvey the land to the complainant on payment to them of said sum of money and interest. This allegation is positively denied as has been mentioned, and a different and much more probable version of the transaction given. What then is the case? The Sangstons having procured a title to this property under an execution against Alexander Harris, issued upon a judgment for a balance of the purchase money due his vendor, and having made sale thereof to Dr. Dare, are restrained by the injunction of this court from parting with the bonds or notes of Dare to them, upon the ground that when they so procured the title, they agreed to hold it merely as security for the sum actually advanced at the time, and that upon the repayment of such advance, they would convey the property to the complainant, a purchaser from Alexander Harris. The defendants, the Sangstons, deny this statement, and aver that they advanced the money for a very different purpose, to wit, to secure a large debt due them from Alexander Harris. Why then should the injunction be continued? If their answer is true, and being responsive, it must upon this motion be taken as true, they are clearly entitled to enjoy the benefit of their purchase without the let or hindrance of this court. The injunction, therefore, must be dissolved.

A. RANDALL, for Complainant.

THOS. G. PRATT, for Defendants.

WILLIAM W. McCLELLAN

vs.

WILLIAM CROOK.

}

MARCH TERM, 1849.

[INJUNCTION TO RESTRAIN EXECUTION OF A DECREE OF THE COURT OF APPEALS—
CHANCERY PRACTICE.]

THOUGH this court has not the power to review, in the proper sense of that term, a decree of the court of appeals, either upon the state of facts upon which that court acted or any others, yet when a state of facts has arisen since such decree was passed showing its *satisfaction*, this court may interfere by injunction to prevent the decree from being used as an instrument of injustice, and an original bill is the proper form to be adopted in such circumstances.

[A bill was filed on the 21st of July, 1843, by William Crook, as the assignee of a mortgage of certain leasehold property in the city of Baltimore, against Wm. H. McClellan, for a sale of the mortgaged premises to satisfy the mortgage debt. The complainant, Crook, had been for many years tenant of the mortgaged premises, and two accounts were stated by the Auditor on the 19th of November, 1844, one of which the Chancellor ratified on the 16th of December, 1844, and decreed that the property be sold for the payment of the sum found by this account to be due the complainant. From this decree the defendant, McClellan, appealed, and the Court of Appeals at their June term, 1846, reversed the decision of the Chancellor, and instead of remanding the cause for further proceedings generally, directed an audit to be made in conformity with their views, by a special Auditor appointed by them for that purpose, who accordingly reported an account in which interest was charged upon the mortgage debt yearly, and the rent credited yearly from the 14th of May, 1839, to the 19th of November, 1844, the date of the Auditor's report, affirmed by the Chancellor. The appellate court then on the 26th of June, 1846, passed a decree reversing with costs the decree of the Chancellor of the 16th of December, 1844, ratifying and confirming the account stated by their special Auditor, and for the purpose of enforcing the payment of the claim thereby found to be due

Crook, decreed, that the cause be remanded to the Court of Chancery, and that unless McClellan should pay into said court the sum of \$485 49, with interest on the sum of \$379 12, from the 19th of November, 1844, until so brought into said Court of Chancery on or before the 1st of April, 1847, then the said mortgaged premises be sold for the payment of said sum and interest, under the orders and decrees of said Court of Chancery, according to the usual course of the said court in such cases, and appointing a trustee to make said sale.

On the 22d of January, 1849, McClellan filed his present bill in this case, in which, after stating the above proceedings in the former case, he avers that Crook continued the occupation of the mortgaged premises for a long time beyond the time up to which the account in the Court of Appeals charged him with rent, and that he in fact continued to occupy the premises up to the 15th of May, 1847, while the account in the Court of Appeals was necessarily limited to and ended with the 19th of November, 1844, and that agreeably to the principles settled by said account in the Court of Appeals, charging the said Crook with rent at the rate of \$400 per annum, nothing would remain due him on said mortgage claim, yet he nevertheless insists that the property shall be sold under the said decree of the Court of Appeals, as if the said mortgage claim, as stated in the audit in said appellate court, remained due and unpaid, and subject to no abatement. The bill further charges that said Crook is now insolvent, and complainant would be without any remedy against him for any part of the rent so accrued to the complainant since the said 19th of November, 1844, except by an injunction from this court, arresting the sale of the property, and a decree directing satisfaction to be entered of said decree as passed by the Court of Appeals, and the prayer of the bill is for such injunction and decree, and for general relief. The injunction was granted as prayed.

The defence taken by the answer of Crook was, that by the principle of the decree of the Court of Appeals, which greatly reduced his original claim, he was chargeable for the rents and profits of the mortgaged estate from a certain day mentioned

in the proceedings to a certain other day long anterior to the date of the decree of said court, and as that decree does not provide for taking any further account against him, or direct any inquiry to be made in respect to his liability for subsequent rents and profits, nor is this court empowered to do anything more than to execute said decree, he insists that that decree is conclusive of the rights and liabilities of both parties arising out of the matters litigated in that suit, and he pleads said decree as a bar to any further account of rents and profits received or supposed to be received by defendant anterior to the date of the same. And that if any such relief could be awarded to the present complainant, he has mistaken his remedy, and that he ought to have proceeded by supplemental bill in the former case. He admits he continued in possession of the mortgaged premises after the 19th of November, 1844, but for what space of time he is not able at this moment to state, but if he is now liable to account for such occupancy, he submits that he is entitled to review the decree of the Court of Appeals, and to correct the same, so far as may be necessary to do even handed justice to the parties. He then points out deductions of ground rent and taxes to be made from said rent of \$400 per annum charged against him by that decree, so as to reduce the clear annual rent to \$200 per annum, and avers that the account directed to be stated by the Court of Appeals was so stated without due notice to him, and that his case was not prepared so as to show the clear net rent which he had received for the premises, and that he was thereby greatly aggrieved, and he submits that if the present complainant is permitted to review the said decree for any purpose, it will be so far opened as may be necessary to correct errors existing therein to the prejudice of this defendant.

After this answer was filed, a motion was made to dissolve the injunction, upon the hearing of which the Chancellor delivered the following opinion.]

THE CHANCELLOR :

Waiving the objection to the answer taken by the complainant, and conceding for the purpose of this motion that it is entitled to be treated as if sworn to by the defendant, I am of opinion that it has not removed the equity of the bill, and consequently that the injunction must be continued.

It cannot be necessary to say that this court disclaims in the most explicit manner any power to review, in the proper sense of that term, the decrees of the Court of Appeals, either upon the state of facts upon which that tribunal acted, or any others. What is resolved by it in view of those facts, or others, is conclusive, and the duty of this court, when required to carry its mandates into effect, is unqualified obedience.

But it is not, in my opinion, at variance with this principle, to say, that upon circumstances which were not, and could not, from the nature of things, have been before the Court of Appeals at the time it passed its decree, it may become the duty of this court to stay its hand, especially when it is manifest that, according to the principles settled by the Superior Court, these circumstances give rise to an equity in direct opposition to the rigorous execution of its decree.

When the decree in this case was passed by the Court of Appeals in June, 1846, there was nothing in the record to show that the possession by Crook of the mortgaged premises continued subsequently to the period stated in the report of the Auditor, to wit, November, 1844, and, therefore, he could not be charged with the rent later than that period, but it is now charged in this bill, and confessed by the answer, that he did so continue in possession to a later period, the bill alleging that this possession continued so long as to extinguish the debt, and the answer, though it does not admit, certainly does not deny, this assertion. It is also charged and not denied that Crook, the assignee of the mortgage, is insolvent, and that if the mortgagor is now compelled to pay, he will be wholly without remedy.

Now, this certainly presents a case in which all must regret the inefficiency of the court, if it be incapable to relieve the complainant. There would, in that event, be a striking defect

in the administration of justice which could only be lamented if the counsel for the defendant in this case is right, but which would be remediless.

The argument is, that this court cannot review the decrees of of the Court of Appeals. It can only execute them when directed to do so. But suppose, after the decree of the Court of Appeals in this case was passed, the mortgagor had paid the balance of the debt in money, and notwithstanding such payment, the mortgagee insisted upon the execution of the decree, will it be said that under such circumstances this court could not interfere by injunction to prevent the wrong? But can it make any difference either in the power of this court, or in the equity of the case, whether the debt is extinguished by a payment in money, or in that which is equivalent to money, as settled by the Superior Court itself? In neither case does this court assume to review the decree of the Court of Appeals, but upon a new state of facts it prevents it from being used as an instrument of injustice. To review would, of course, involve the power to reverse either upon the record as it stood in the Superior Court, or upon facts arising subsequently. This the court unequivocally disclaims, but it is thought that when it is made to appear satisfactorily that the decree of the Court of Appeals has been *satisfied*, either by a payment in money, or money's equivalent, and when, notwithstanding such satisfaction, the party who obtained the decree is proceeding to enforce it by execution, this court may, and it is its duty, to prevent so manifest a wrong.

The cases cited by defendant's counsel of *West vs. Skip*, 1 *Ves. Sen.*, 245, and *Johnson vs. Northeby*, 2 *Vernon*, 407, lay down the rule applicable to bills brought to carry former decrees into execution, and they show that as a general rule upon such bills, the court can only do that, and not vary, though sometimes this has been done to attain the justice of the case, though, as stated in *Vernon*, this must be done upon the proofs in the former cause, and not upon any new proofs.

But the present is not a bill to carry a former decree into effect, but a bill to arrest the execution of a former decree, not

because of any error in that decree, but because of its *satisfaction*, as shown by facts arising since it was pronounced. So far, in fact, from imputing error to the former decree, the bill in this case rests upon the principles therein adjudicated.

The principles settled by the Court of Appeals in the case of *Crapster vs. Griffith*, 6 H. & J., 144, seems to me to go far to vindicate the conclusion to which I have come in this case, and that case also shows that an original bill, as in this case, is the proper form to be adopted in such circumstances. The decision of the court upon this point is made more striking, because the Chancellor, whose decree was reversed, made the objection that a supplemental, and not an original, bill, was the proper remedy. The court upon this motion is not called upon, nor is it in a situation to decide the other question presented by the answer. The injunction in this case will be continued.

CHAS. F. MAYER, for the Complainant.

THOS. S. ALEXANDER, for the Defendant.

MARY O. G. CRONISE BY HER NEXT FRIEND

VS.

JOHN CLARK, HENRY MANKIN ET AL.

} JULY TERM, 1849.

[PRACTICE—MORTGAGE BY FEME COVERT INFANT—ACT OF 1833, CH. 181.]

A MORTGAGE of her reversionary interest in real and personal estate, executed by a *feme covert* infant to secure a debt due by a firm of which her husband was a member, is absolutely void and incapable of confirmation.

She may insist upon her incapacity to execute such an instrument notwithstanding a decree has been passed for the sale of the mortgaged property under the act of 1833, ch. 181, the proceeding to obtain such decree under that act being *ex parte*.

On motion to dissolve on bill and answer, so much of the bill as is not denied by the answer, is taken for true.

The averment in the bill of the infancy of the complainant at the time she executed the mortgage, though not admitted by the answer, and proof called for to sustain it, must, on motion to dissolve, be taken to be true.

Contracts void at law are void in equity, and are considered by the latter courts, as well as the former, incapable of being made good by any subsequent acts of the parties.

The summary proceedings prescribed by the act of 1833, ch. 181, are not applicable to mortgages of moneyed securities and bank stock.

The statement verified by affidavit directed by the 3d section of the act of 1833, ch. 181, to be filed, may be filed at any time before the sale.

[The bill in this case was filed for an injunction restraining execution of a decree of this court for the sale of certain mortgaged property, passed under the provision of the act of 1833, ch. 181, the mortgage having been executed with reference to that act. Part of the property so mortgaged was devised by the will of William Abbott, in trust, to permit Elizabeth B. Abbott to take the rents and profits thereof during her widowhood, and after her death or marriage, in trust for the complainant, Mrs. Cronise, and, on certain contingencies, over to other persons. The residue of said property was devised by John E. Stansbury, the father of the said Elizabeth B. Abbott, in trust, to permit said Elizabeth to take the rents and profits during her life, and after her death, in trust for her children, of whom the complainant was one. The other facts of the case are sufficiently stated in the opinion of the Chancellor, delivered upon the hearing of the motion to dissolve the injunction upon bill and answer.]

THE CHANCELLOR:

This case is brought before the court upon a motion to dissolve the injunction, and has been argued by the counsel of the respective parties.

It appears that on the 29th of September, 1847, a mortgage was executed by Elizabeth B. Abbott and William H. V. Cronise and Mary O. G., his wife, to the defendants, Clark & Mankin, to secure to the latter the sum of nine thousand dollars, due them from the firm of William H. V. Cronise & Co., of which firm the mortgagor, William, was a member.

The mortgaged premises consist of real estate and ground rents in the city of Baltimore, bank stock and moneys, secured on mortgage, and the condition of the mortgage was that the same should be void, provided the debt thereby intended to be secured should be paid in twelve equal installments, at stipulated periods.

Several of the installments having fallen due and remaining unpaid, and the mortgage containing the assent and agreement of the mortgagors provided for in the act of 1833, ch. 181, a petition was filed in this court in July, 1848, by the mortgagees, praying that a decree might be passed for the sale of the mortgaged premises, in conformity with the provisions of that act, for the payment of the installments of the debts then due, with the interest thereon, and a decree passed accordingly on the 8th day of that month, appointing a trustee, with authority to sell in case the installments due, with the interest and costs, should not be paid by a day limited for that purpose. The day having passed, and the money not being paid, the trustee advertised the property for sale, when the present bill was exhibited by Mrs. Cronise alone, asking for and obtaining an injunction to restrain him upon the several grounds therein stated.

The first is, that at the time of executing the deed of mortgage, the complainant was under the age of twenty-one years, as was known to her husband and mother, the other mortgagors, and as she believes, to Clark & Mankin the mortgagees; and that she has never, at any time or in any manner, ratified or confirmed or acknowledged the validity thereof.

Clark & Mankin, the only defendants who have answered the bill, deny that at the date of the mortgage they had any knowledge, nor have they now, that the complainant was at that time under age, and put her to the proof of her alleged infancy. And they say, that long since the date of the mortgage, and when, the defendants believe and charge, the complainant was of full age, if, indeed, under age at the making of the mortgage, she ratified, sanctioned and confirmed the same.

It must, of course, be perfectly clear, that if Mrs. Cronise was under the age of twenty-one years when she executed this mortgage, it could not be binding upon her, and that unless she has, since she attained the legal capacity to contract, ratified her act in such a way as to give it legal efficacy against her, if it is capable of such ratification, she may now insist upon her incapacity; the petition of the mortgagees, upon

which they obtained the decree, having been *ex parte*, and she having had no notice of it until recently.

Mrs. Cronise charges not only that she was a minor at the time she executed the mortgage, but that she has never, at any time since, ratified and confirmed, or acknowledged the validity thereof. With respect to the averment of the minority of the complainant, at the date of the execution of the mortgage, the answer neither admits nor denies it, and puts her to the proof; but they say she has, since she attained full age, sanctioned and confirmed it. The answer does not show how or in what manner she did so sanction and confirm it, and there is nothing upon the face of the instrument to enlighten us upon the subject.

It appears by the mortgage itself that it was given to secure to the mortgagees a debt due them from William H. V. Cronise & Co., of which firm the husband of the complainant was a member, and therefore, it is insisted that it belongs to that class of contracts made by an infant which are considered *void* and incapable of confirmation.

The averment of infancy at the time of executing the mortgage is not denied, and although it is not admitted and proof called for, it must, for the purpose of this motion, be taken to be true, the rule being that on a motion to dissolve on bill and answer, so much of the bill as is not denied by the answer is taken for true, and it becomes, therefore, a question, assuming that so much of the answer as speaks of a confirmation of the deed is responsive, and that the form of the confirmation need not be shown, (a position which may, perhaps, well be doubted,) whether a deed of this description, executed by a minor, for the purpose of securing a debt due by another, is not absolutely void, and if void, incapable of confirmation.

In the case of *Fridge vs. The State, use of Kirk*, 3 G. & J., 103, the Court of Appeals decided that a release to her guardian, given by a female ward between the ages of sixteen and twenty-one years was void, upon the ground that such instruments are, in their nature and tendency, to the prejudice of infants, and opposed to sound policy. The court, in the

opinion delivered, say, "some contracts made by infants are binding, such as contracts for necessities; some are void, and others voidable, only such as contracts that may be for the benefit of the infant. But a contract that a court can see and pronounce to be to the prejudice of the infant is void." And the instrument in that case, the release spoken of, was adjudged to be absolutely void.

Now, it seems to me to be most obvious that the deed in this case is as evidently prejudicial to the infant as the release in the case decided by the Court of Appeals. This is the case of an infant *feme covert*, joining in a mortgage of her reversionary interests in real and personal estates, to secure debts due from her husband, or rather from a commercial firm, of which her husband was a partner, without any consideration whatever moving to her. It is a contract from which she cannot possibly derive a benefit, and which the court cannot fail to see and pronounce to be to her prejudice. It must, therefore, be regarded as merely void and incapable of confirmation, the rule being that contracts void at law are void in equity, and are, therefore, considered by the latter courts as well as the former, incapable of being made good by any subsequent acts of the parties. *Newland on Contracts*, 496; *Blessing vs. House*, 3 *G. & J.*, 290. My opinion, therefore, is, that assuming Mrs. Cronise to have been a minor at the time she executed the mortgage, as upon this motion it must be assumed, it is upon the principle in the case in 3 *G. & J.*, void as to her, and incapable of confirmation, and therefore, so far as her rights are concerned, the injunction must stand.

With respect to William H. V. Cronise and Elizabeth B. Abbott, the case stands upon different grounds. They were competent to contract, and there is no averment or pretence that any fraud or imposition was practiced upon them or either of them. And moreover, they are not now here complaining of the decree passed by this court in July, 1848. If, therefore, there is in that decree anything of which they have a right to complain, relief cannot be afforded them upon this bill. Whether they or either of them have such estates in the prop-

erty conveyed by the mortgage and decreed to be sold as this court ought to sell, is not a question to be considered upon this bill, which seeks to vindicate and protect the rights of Mrs. Cronise, and no one else.

It may be that there is property embraced in the mortgage, and directed to be sold by the decree, which, under the provisions of the act of 1833, ch. 181, is not liable to be sold by the summary proceeding authorized by that act. The second section declares that "in order to facilitate the enforcement of mortgages of real property and estate in the city of Baltimore, that in all cases of conveyances by way of mortgage of *lands* or *hereditaments* or *chattels real*, situate in the city of Baltimore, and where, in the said conveyances, the mortgagor shall declare his assent," &c. The mortgage in this case embraces moneyed securities and bank stocks, and to that extent the summary and peculiar proceeding prescribed by the legislature would seem to be inapplicable. But the decree was passed, and we have now nothing to do with that question, or any other, not affecting the rights of the complainant in this case, and the injunction, therefore, except as to her, will be dissolved. The statement, verified by affidavit, directed by the 3d section of the act of 1833, ch. 181, to be filed, may be filed at any time before the sale, according to the terms of the section.

ADDISON, ALEXANDER and PRESTON, for Complainant.
GLENN and RIDGELY, for Defendants.

JOSEPH SHEPHERD AND OTHERS	}	DECEMBER TERM, 1850.
VS		
MARY ANN BEVANS AND OTHERS.		

[LIMITATIONS—CLAIMS ALLOWED BY ORPHANS COURT—PRACTICE.]

THE act of 1849, ch. 224, suspending the operation of the act of limitations in certain cases, is prospective and not retrospective in its operation.
An instrument under seal, attested by a subscribing witness, may be proved in this state without calling such witness.

Where a claim against the personal estate is disputed by the administrator, and the Orphans Court allow a reduced amount, and both parties acquiesce, the claimant cannot as against the proceeds of the real estate, claim more than was allowed against the personal estate.

[The real estate of Mary Shepherd, deceased, who died in September, 1847, was sold under the proceedings in this case, for payment of debts and distribution amongst the parties entitled. The case was brought before the Chancellor upon exceptions to the Auditor's report and accounts. The disputed claims are those numbered 1, 2, 3, 4, 5 and 6.

Claim No. 1, preferred by Joseph Shepherd consists of an open account against the deceased, commencing in April, 1846, and ending in December, 1847, on which was a balance due with interest of \$228 59, and was filed on the 19th of September, 1849. The first item is a charge of \$65, for building an overseer's house; the 2d "for cash lent, \$120 49, and interest thereon, \$10 54;" the 3d, for building and getting out frame of corn house, \$50; the 4th, for a cart body, \$9. Then follows a credit of \$36 04, for 53 bushels of wheat. The statute of limitations was pleaded to the three first items, they having accrued by the 10th of July, 1846, and it was further objected that the whole claim was not proved. The proof in its support is stated in the opinion of the Chancellor, and was ample except as to the 4th item, of which there was no proof. As to the plea of limitations, it was proved by James Owens, Sen., that within a month before her death the deceased said she owed Joseph, the claimant, a good deal of money. It was also insisted that the act of 1849, ch. 224, was retrospective in its operation and applied to this claim, so as to save it from the operation of the statute.

Claim No. 2, was a single bill for \$170 77, dated the 17th of February, 1844, payable to Joseph Shepherd, and purporting to be signed by the deceased, by her mark thereto, and witnessed by Susan Shepherd, who was one of the complainants in the cause. To this *non est factum* was pleaded, and it was also objected that it was not proved. The proof is stated by the Chancellor.

Claims Nos. 3 and 5, were preferred by Elizabeth and Susan Shepherd. They consist of two accounts against the deceased, by each of the claimants, exactly alike in every particular. They each charge the deceased with the hire of a negro woman from the 1st January, 1832, to the 1st of January 1848, at \$20 per annum, \$320, and cash lent at sundry times \$93. When these claims were preferred against the personal estate in the Orphans Court, they were disputed by the administrator, and that court passed them for only \$75, and it was insisted that the decision of that court standing unreversed, concludes these claimants. It is a decision on the *primary* fund for the payment of debts, in which the representative of the personalty, who holds all the vouchers and other proofs of the estate was the defendant, and is a judgment concluding the claimants as to all *secondary* funds which may be pursued by them, as much as a judgment at law against the claim where the administrator was defendant at the claimant's suit would bar any proceeding against the heir. It was also objected that these claims were barred by limitations except as to the last three years of the hire of the servant, and were not proved.

Claims Nos. 4 and 6, were two single bills, executed by the deceased, the one for \$530 09, in favor of Susan Shepherd, and dated the 14th of September, 1845, the other for \$810 79, in favor of Elizabeth Shepherd, and dated the 29th of October, 1840. These claims constituted the claims upon which the bill was filed for the sale of the real estate.

Upon these several claims and exceptions thereto, the Chancellor delivered the following opinion.]

THE CHANCELLOR :

I have considered the exceptions to the report of the Auditor and carefully read the evidence and arguments of the counsel of the parties, and am of opinion.

1st. That claim No. 1, *exhibit A.*, is proved, except with reference to the 4th item thereof, and with the further exception that the charge for building the overseer's house should be reduced to \$60, according to the proof of James Owens, Sen.

And I am also of opinion, that the record contains sufficient evidence to exempt this claim from the plea of limitations. I place the exception upon the proof and not upon the act of 1849, ch. 224, which I regard as prospective.

2d. I do not think claim No. 2, exhibit B., has been sufficiently proved in opposition to the plea of *non est factum*. The execution of the paper by the alleged debtor, might be proved without calling the subscribing witness under our act of Assembly, but in this case, such execution is not proved at all, and the claim must be rejected.

3d. As to claims numbered 3 and 5, I am of opinion, the claimants cannot, as against the real estate claim more than they were allowed against the personal estate. Suppose, instead of a reduction of the claim in the Orphans Court, and in a contest with the personal representative, the entire demand had been defeated and the creditor had acquiesced in the result, could he afterwards set up the same claim as against the real estate? I apprehend he could not. The personal representative of the deceased debtor, in whose hands are supposed to be the papers and vouchers of the deceased, is the person selected by the law to carry on these controversies, and if a claimant is defeated, wholly or partially, in such a controversy, it appears to me, he should not afterwards be permitted to renew the contest with those not so well prepared to make a defence. It is said the administrator was not bound to pay, though the Orphans Court passed the claim in part, and this is true. Neither was the creditor bound to acquiesce in the judgment of that court, nor to receive his dividend, but as both parties have thought proper to acquiesce, the question is, whether the creditor can be suffered to litigate the same matter again with parties who have not the custody of the papers of the deceased, and consequently are less competent to defend themselves. It is admitted, there is no proof in support of the cash items contained in these accounts, and there is, moreover, upon their face a concurrence and coincidence of amounts, both as to the value of the negro hire and the amount of the cash lent which is rather remarkable. My opinion, then, is, that they can be allowed for no more than was allowed in the Orphans Court. It is, I think, no answer to say,

the heirs were not bound by the decision of that court. They were not bound because not parties to the controversy there, but the claimants were parties and ought to be bound.

4th. Claims Nos. 4 and 6, are established by the decree, and are to be allowed.

5th. The exceptions to claims numbered 7 and 8, being abandoned, they will be allowed. In fact, these claims appear to be fully established.

A. RANDALL, for Bevans:

McLEAN, for Shepherd.

ROBERT BENTLEY ET AL

VS.

BENJ. SHRIEVE ET AL.

} JULY TERM, 1851.

[ATTACHMENT.]

MONEY in the hands of a trustee of this court is not liable to attachment.

[The statement of facts referred to in the opinion of the Chancellor in this case shows, that Kilgour, the trustee in this case, held in his hands certain moneys belonging to the creditors of Shrieve; that John I. Harding, of Loudon county, Virginia, was one of those creditors, and had filed his claim in the cause, and the account stated by the Auditor allowed a distributive share thereto; that said Harding, on the 2d of September, 1847, executed a deed of trust to Thomas P. Knox, including his real and personal estate and all debts of every description due him; that Ramey, a citizen of Loudon county, Virginia, to whom Harding was indebted, on bond, obtained a writ of attachment out of Montgomery County Court, on the 29th of July, 1848, against said Harding, which was, on the same day, laid in the hands of Kilgour, the trustee; that the deed of trust from Harding to Knox was not recorded in the clerk's office of Montgomery county or any county in this state, or in the Chancery office, or filed therein.]

Upon these facts, the question submitted by the trustee and the attorney of Ramey was, whether Knox was entitled, by virtue of the deed to him, to the proportion of the fund awarded to Harding, or whether Ramey, by virtue of his writ of attachment, will be entitled to it. Upon this question the Chancellor delivered the following opinion.]

THE CHANCELLOR :

The agreement in this case, is not signed by, or on behalf of Knox, the trustee, in the deed of Harding and wife, dated 2d of September, 1847, and, therefore, it might be premature and irregular to pass an order disposing finally of the question submitted for my opinion.

I have, however, read the agreement, and am of opinion, that the attachment issued by Ramey, and laid in the hands of the trustee, Alexander Kilgour, cannot be maintained.

In the case of the *Farmers Bank of Delaware vs. Beaston*, 7 G. & J., 421, it was decided that money or property in the hands of receivers appointed by this court could not be attached, though the simple fact that receivers had been appointed and given bond would not protect it. The exemption of property in the possession of a receiver from attachment, is also understood to have been decided by the Circuit Court of the United States for this District.

But if property in the hands of a receiver is not liable to attachment, it is not perceived upon what ground money held by a trustee of this court can be reached in that way. The trustee is the officer of the court, and money in his hands is under its protection and subject to be disposed of by its owner.

I consider the principles announced by the Court of Appeals in the case referred to, are decisive so far as the rights of the attaching creditor are concerned, and I can see no reason why the deed of trust to Thomas P. Knox should not be allowed to operate upon the fund in question in the hands of the trustee.

McLEAN, for the Trustee.

A. RANDALL, for Ramey.

GEORGE A. WILLIAMS AND WIFE

vs.

SAMUEL C. DONALDSON AND

JAMES WINCHESTER.

} DECEMBER TERM, 1849.

[POWER OF MARRIED WOMEN OVER THEIR SEPARATE ESTATE.]

A MARRIED woman has no power over her separate estate but such as has been specially given to her, and in exercising the power of disposition she is restricted to the particular mode specified in the instrument under which she takes when it undertakes to make such specification.

[By a marriage settlement, executed on the 11th of September, 1849, in contemplation of a marriage then intended to be shortly had and solemnized between George A. Williams and Jane A. Douglas, all the real and personal estate of the intended wife was conveyed to Donaldson & Winchester, *in trust*. *First*, for the said Jane, her heirs, executors, administrators and assigns, until the solemnization of the intended marriage. *Secondly*, after said marriage to receive the rents, profits, income and dividends of all said property, and to pay over the same, or such parts thereof as she shall require, to the said Jane, "on her own separate receipt, or to her own separate order in writing," and to invest such parts of the same as she shall not so require, in such property, real or personal, as she and her husband "shall in writing under their hands jointly direct and designate," and the income of such investments to pay to the said Jane, "on her own separate receipt or order in writing, as is above provided for in regard to the income of the property hereby conveyed," with power to the said trustees, "with the consent and approbation" of her and her husband, "testified in writing for that purpose, to sell, convey, transfer and dispose of any of said property," and lay out the proceeds in "new stocks, funds, securities or real estate," as often as occasion shall require, all which new stocks, &c., and the income thereof, "shall go and remain upon the same trusts and for the same intents and purposes" as those which shall have

been so sold. *Thirdly*, if the said Jane shall survive her said husband, then, on his decease, to reconvey to her all the property, which shall, at his death, be held by the said trustees, or the survivor of them by virtue of these presents. *Fourthly*, if the said Jane shall die before her said husband, then, on her decease, to convey all the trust property held by them "to such person or persons, and in such proportions, and for such estates as the said Jane, by any last will and testament, or by any instrument in the nature of a last will, shall direct and appoint, and the said Jane is hereby expressly authorized and empowered to make such last will and testament or instrument in the nature of a last will, notwithstanding her coverture as aforesaid." *Fifthly*, if the said Jane shall die before her said husband, leaving no last will, or instrument in the nature of a last will, then, on her decease, to convey all said trust property then held by them, "to such child or children or the lineal descendants of any child or children of the said Jane as shall be living at her decease, in fee simple and absolute property, in the same proportions as are observed in the descent and distribution of intestate estates in Maryland." *Sixthly*, if the said Jane shall die before her said husband, leaving no last will or instrument in the nature of a last will, and leaving no lineal descendants living at the time of her death, then, on her decease, to convey all the said trust property then held by them "to the right heirs at law and personal representatives of the said Jane, in fee simple and absolute property, and in such proportions as are observed in the descent and distribution of intestate estates in Maryland, and as if she had died sole and unmarried."

The settlement then contains a covenant on the part of the intended husband, that he will permit the said Jane to receive the income of said trust property "to her own sole and separate use, without any hindrance on his part; that her own separate receipts or orders in writing shall be good and valid discharges therefor; that any last will, or instrument in the nature of a last will, executed by the said Jane, shall be held valid in the same manner as if she had continued sole and un-

married," and that he will, from time to time, upon every reasonable request of said trustees or the survivor of them, "make, do, and execute all and every such further act and acts, thing and things, which may be necessary or proper for the better securing and carrying into effect, in their true intent and meaning, the trusts, purposes and intentions herein declared." The trustees also covenant that they will stand seized of the trust property "for the uses, trusts, purposes and intentions aforesaid," and, upon reasonable request, will well and truly account for all moneys by them respectively received, and for all their respective proceedings in the premises, and that they will faithfully perform all the aforesaid trusts, "each trustee being accountable for his own willful acts and defaults, and not for the acts and defaults of the other." The settlement also contains a provision for the appointment of a new trustee or trustees "by joint writing under the hands and seals of the said Jane and her husband," in case of the death or resignation of either of those named therein.

On the 16th of January, 1850, Williams and wife filed their bill, which, after stating the above marriage settlement, and that the property thereby conveyed consisted entirely of personal estate, amounting to upwards of \$50,000 in value, charges that said Williams has been for some time engaged in business as a partner in a certain firm in the city of Baltimore, which business is prosperous and yields him a handsome profit, and that the addition of the sum of \$16,000 to the capital engaged in said business on his account would greatly enlarge it and increase his profits to a large sum beyond the interest of such additional capital; that for this reason, and in order to increase the income of complainants, he is desirous of borrowing the said sum of \$16,000, and the said Jane wishes to pledge so much of her personal property embraced in said settlement, as may be necessary to secure the payment of the said sum which her husband desires to borrow, and that she applied to the said trustees, and directed them, as she conceives she is legally entitled to do, to assign and transfer certain specified stocks held in trust by them for her separate use, which

they have refused to do, alleging they are not authorized so to do by the terms of said settlement. The bill then prays that said trustees may be decreed to assign and transfer the said enumerated stocks by way of pledge, according to the direction of the said Jane, and for general relief.

The trustees, in their answer, admit the allegations of the bill, and aver, as the reason for their refusal to make the transfer demanded of them by Mrs. Williams, that they do not know whether by the true construction of said deed of settlement they would be justified in making such assignment and transfer; they further aver that they are willing and anxious to perform the duties of their trust in accordance with its true meaning, and they rely upon this court to direct them in the present instance, and that they will abide by and perform whatever the court may decree in the premises.

Upon this bill and answer, the Chancellor delivered the following opinion.]

THE CHANCELLOR :

I have read, with much attention, the marriage settlement and deed of trust exhibited in this case, and have examined and carefully considered the authorities referred to by the solicitor for the complainants, and some others bearing upon the subject, and am of opinion that such a decree as this bill prays for cannot be passed.

The American doctrine upon this interesting question is at variance with that which seems now to prevail in England, and I think the former is vindicated by Chancellor Kent and Chief Justice Gibson, with a force and clearness of reasoning which cannot be shaken. *Vide The Methodist Church vs. Jaques*, 3 *Johns. Ch. Rep.* 78, and *Thomas vs. Folwell*, 2 *Wharton*, 11.

The American doctrine, as established by these cases, and others, is, that the power of a *feme covert* over her separate estate must be exercised according to the mode prescribed by the instrument under which she becomes entitled to the property, and that to confine her to that particular mode the instrument need not specially restrict her to it. That she has no power

over her separate estate but such as has been specially given to her, and in exercising the power of disposition she is restricted to the particular mode specified in the instrument under which she takes when the instrument undertakes to make such specification. By referring to the cases collected in the *Law Library*, vol. 65, pages 370, *et seq.*, this will be found to be the settled doctrine in this country upon the subject, and I am of opinion that it does not conflict, but is in harmony with the cases which have been decided by the Court of Appeals in this state.

The deed, in this particular case, appears to have been drawn up with much care, and prescribes in very precise terms the mode in which Mrs. Williams shall dispose of her separate estate, and I should much apprehend, that by passing the decree prayed for by this bill, I should defeat the object to accomplish which the deed was executed.

THOS. DONALDSON, for the Complainant.

Note by the Reporter.—The same question presented in this case has recently been decided by the Court of Appeals in the case of *Williamson et al vs. Miller and Mayhew*, at December term, 1853, (which has not yet been reported,) and the above views of the Chancellor are fully sustained in the opinion of the appellate court in that case, delivered by his honor *Chief Justice Le Grand*.

JOSEPH WHITE	}	DECEMBER TERM, 1849.
vs. JOHN WHITE AND OTHERS.		

[DEMURRER TO BILL—MULTIFARIOUSNESS.]

UPON a bill by a partner for an account of the partnership affairs, a party, not a partner in the firm, cannot be called to account in the capacity of a partner, and he may demur to the bill making him a party.

But if one of the partners has transferred his interest in the partnership to a third party, such party may be called upon to account for the affairs of the

firm in connection with the partners, and is a necessary party to a bill calling for a settlement of the partnership.

The allegation that one of the partners "is about to receive, if he has not already done so, a large sum from J. W. and H. W. or one of them as a consideration for arresting proceedings against them, and for a transfer of all his interest in the partnership," is too uncertain to make it necessary that H. W. who was not a partner, and but for this alleged transfer had no interest in the litigation, should be required answer.

[The bill in this case was filed on the 22d of May, 1849, by Joseph White, and alleges, in substance, that in February or March, 1835, complainant and his father, John C. White, of the city of Baltimore, and his brother, Campbell P. White, of the city of New York, formed a partnership in the former city, under the firm of John C. White and sons, for the purpose of distilling spirits, (a partnership similar to which had existed many years previously in the same business, between the said John C., Campbell P. and Robert White, and had been dissolved by the withdrawal of Robert,) during the continuance of which large gains and profits were made, which were employed partly in the extension of their business, and partly in the purchase of property and erection of buildings. That complainant attended to the manufacturing department of the business, while the accounts of the partnership were entrusted exclusively to his brother, Henry White, or his brother, John White, in the latter of whom complainant had at that time unlimited confidence, and the accounts of the firm being at all times subject to his control, he became fully acquainted with the profits thereof, and of the share of the assets due each partner. That in March, 1835, there belonged to the firm certain real estate in the city of Baltimore, the title whereof stood in the name of the senior partner, John C. White, but was held by him as the property, and for the benefit, of the partnership. That said John White, though not a member of the firm, was yet, as the eldest brother of the family, regarded by the firm, and all its members, as its confidential adviser, and was entrusted with the full control of its affairs, and its books and property, and did, in fact, by consent of all, entirely regulate its books and affairs, and dispose of its means in such manner as he judged proper, all of which

control and management were by him rendered on his own motion, ostensibly for the benefit of the firm, and professedly without any compensation, or hope of compensation, but with the sole desire to advance the interest of the partnership. That being thus familiar with the affairs of the firm, and knowing the aforesaid real estate to be its property, and not that of said John C. White, in whose name it stood, and knowing also that the firm was not indebted to him to any amount, the said John White designing for his own benefit to defraud the firm, and abuse the confidence so implicitly reposed in him, fraudulently persuaded his said father, John C. White, who was then very old and incapable of attention to business, that the firm was largely indebted to him, the said John White, and caused and procured his said father to convey to him, on the 7th of March, 1835, all said real estate in payment of said pretended debt, and did further, by similar false statements and fraudulent representations, accounts and charges, cause and procure the assent of complainant and the other copartners to said conveyance, they all then relying as the ground of such assent on the said statements and representations of the said John, whose assertions, complainant, in the fullness of his respect and confidence, regarded at that time as conclusive in reference to anything within his knowledge. That devoting his time exclusively to the manufacturing department of the business, complainant was in utter ignorance of the accounts of the firm, and of the individual members thereof with the firm, the books and accounts never having been examined by him, because of his confidence in the statements of the said John. That he has had no opportunity to examine said books and accounts, or obtain access to the same, from the day he first desired to inspect them to the present time, although he has constantly and earnestly claimed as a right, or solicited as a favor, such opportunity of access and inspection, but on the contrary, he has been refused such inspection, and has been thwarted in his every efforts to obtain by legal proceedings such examination, by every artifice which human ingenuity could devise.

The bill then further charges that said John White, having

constantly refused complainant access to the books of the firm, has for some years past pretended complainant was a debtor to the firm to a large amount, when, in fact, upon a fair account to be taken of all the business of the firm from its commencement, and when all false, fraudulent, and improper entries have been expunged or corrected, he avers he will be entitled to a large amount of money as his share of the partnership, profits and assets. That said John fraudulently, and with intent to delay complainant in the settlement of his accounts, has refused to give the information desired, and has, in combination with his brother, Henry White, who was the agent of the firm, and Campbell P. White, one of the partners thereof, resorted to every expedient and artifice and oppression which could weary the patience and exhaust the means of complainant. That said John White, fraudulently insisting upon a pretended debt due by complainant, and refusing all examination of the books of accounts, and denying all other information on the subject, and having the books of accounts under his control, and knowing the true state of the accounts, and acting under an alleged power of attorney, as the agent of Campbell P. White, and as representative of the estate of John C. White, then deceased, at last obtained from complainant, worn out by the vexations and losses of delay, the execution of certain articles of agreement, executed on the 10th day of May, 1848, a copy of which is exhibited with the bill. That at the time the negotiation which led to the execution of this agreement, complainant believed his brother, Campbell P. White, concurred with his brother, John White, in his statement of the fairness of the accounts of the partnership, and though he believed he was about to sacrifice a large portion of the same he believed justly due him, yet he was not prepared for the result to which he has been now led by the recent disclosures and action of his said brother, Campbell P. White. That said Campbell P. has recently and deliberately stated that he was opposed to the execution of said agreement, and refused for a long time all co-operation therein, because it involved a fraud upon the rights of the complainant, and could not be binding, and at last, when he consented to sign the same, refused to con-

tribute any part of the sum paid to complainant on account thereof. That he has also declared that the accounts of the firm since 1835 commenced with fraudulent balances, and were themselves fraudulent and void. That, not content with these declarations, the said Campbell P. filed a bill in the equity side of the Circuit Court of the United States, praying for relief against the conveyance made in 1835 by John C. White to John White, and also insisting upon other frauds committed by said John White, in combination with Henry White, the said Campbell filed his other bill in this court, in which he alleges the said Henry and John are largely indebted to said firm, copies of both of which bills are exhibited. That said Campbell P. has recently stated that during certain years in which John White pretended the firm had made no money, he has now discovered by the books they had made over \$160,000. That notwithstanding these disclosures, and bills for the relief against the frauds of John White, the said Campbell P. White, as complainant, is informed, and verily believes, is about to obtain, if he has not already done so, large amounts of money from the said John White, and Henry White, or one of them, as a consideration for his arresting the proceedings so instituted by him, and for a transfer of all his interest in the partnership aforesaid.

The prayer of the bill is, that the agreement of May, 1848, and also a deed of the 12th of May, 1848, made in pursuance thereof, and the deed of the 7th of March, 1835, may be decreed to be null and void, and delivered up to be cancelled. It also asks from him discovery in relation to the several charges against John White, and that said Campbell P. White may state the amount he has received or agreed to receive from the said John White and Henry White, or either of them, and which the said John White and Henry White, or either of them have agreed to pay him, in consideration of his agreement to dismiss his bills of complaint above referred to, and of the transfer of his interest in the partnership assets and profits.

The defendant, Henry White, filed a demurrer to this bill, because the complainant hath not in and by his said bill made or stated such a case as doth or ought to entitle him to any

such discovery or relief as is thereby sought and prayed for from or against this defendant. That this defendant is not a necessary, material or proper party to any litigation in respect of or relating to any matters of equity pretended in said bill of complaint against his co-defendants ; and that said bill contains and alleges several distinct matters and causes in no way dependent or associated with each other. or proper to be litigated in one suit.

Upon this demurrer the Chancellor delivered the following opinion.]

THE CHANCELLOR.

To the bill filed in this case, the defendant, Henry White, has demurred, and for cause of demurrer says, "that the said complainant hath not in, and by his said bill, made or stated such a case as doth or ought to entitle him to any such discovery or relief as is thereby sought and prayed for from or against this defendant," "and that the said defendant is not a necessary, material, or proper party to any litigation in respect of or relating to any matter of equity pretended in said bill of complaint against his co-defendant."

This demurrer was submitted by the defendant, Henry White, during the sittings of the term, and is now, under the rule, laid before the court for decision, upon an argument in writing on his part.

The bill has been carefully read and considered, and I am of opinion that it does not state a case upon which the complainant can, upon the principles which govern pleadings in equity, be entitled to a discovery and relief against this defendant.

Henry White was not a partner in the firm of John C. White & Sons, and cannot be called upon to account in the capacity of a partner, and if he is liable at all to the complainant for any thing connected with the affairs of the partnership, it is in respect of the allegation that Campbell P. White, who was a partner, "is about to receive, if he has not already done

so, a large sum of money from the said John White & Henry White, or one of them, as a consideration for his arresting the proceedings so instituted by him," (referring to a suit which had been commenced by Campbell P. White against the said Henry White & John White,) "and for a transfer of all his interest in the partnership aforesaid."

The bill does not allege that Campbell P. White transferred his interest in the partnership to Henry White, or that any money was paid him by Henry White. The allegation is, that money was paid him by John and Henry, or one of them, in consideration of the transfer of his interest in the partnership, and therefore it does not appear by whom or to whom the transfer was made.

This statement of the plaintiff's case, as I think, leaves it too uncertain to make it necessary that Henry White, who, but for the supposed transfer, has clearly no interest in the litigation, should be required to answer, but as the objection is founded upon an ambiguity in stating the plaintiff's case, I shall, while ruling the demurrer good, retain the bill as against this defendant, to give the plaintiff an opportunity of amendment.

The objection that the bill is multifarious, as blending several distinct matters and causes of action, in no way dependent or associated with each other, or proper to be litigated in one suit, is not, I think, well taken.

If the bill is to be understood as averring that the defendant, Campbell P. White, who was a partner, has transferred his interest in the partnership to John White and Henry White, or to the latter alone, I can see no good reason why he may not be called upon to account for the affairs of the concern in connection with the partners, as in that event, he would have an interest in common with them, and would be a necessary partner to a bill calling for a settlement of the partnership. Neither can I see why the settlements of 1835 and 1848, may not be investigated and litigated in the same bill. The former may have led to the latter, and, therefore, there would seem to be a propriety in examining into both at the same time. At all events, I cannot now see that these two matters are so dis-

tinged as to render them altogether unfit to be associated in one suit.

STEWART and NELSON, for the Complainant.

ALEXANDER CAMPBELL and JOHNSON, for Defendants.

JAMES T. CONNER AND OTHERS
 vs.
 ANNA MARIA OGLE, EX'X
 OF BENJAMIN OGLE AND OTHERS.

} DECEMBER TERM, 1848.

[CONSTRUCTION OF WILL—ORPHANS COURTS, THEIR POWERS, &c.—EXECUTORS AND TRUSTEES.]

A TESTATRIX devised her estate real and personal to trustees in trust to “apply the rents and profits thereof to the support and maintenance of her daughter during her life, and to the support and maintenance, and education of her children,” “and after her death in trust, for her children to be equally divided amongst them.” The daughter at the date of this will, and death of the testatrix had four children by her then husband, who died during the life of the testatrix. She subsequently married again, and had by her second husband five children. **HELD—**

- 1st. That under this will the children of the daughter by the second marriage, as well as those by the first are entitled to maintenance and education out of the interest of the trust fund during the life of the daughter, and to a distributive share of the principal after her death.
- 2d. The provision for maintenance and education commences from the birth of each child or the death of the testatrix and continues during its minority, or until its marriage, if a female, or the death of its mother.
- 3d. The representatives of such of the deceased children to whom none of the interest of the trust fund was paid for their support and maintenance, are entitled to an account for the sum which should have been paid to them.
- 4th. The trustee appointed under this will, might have performed all the duties of the trust without an application to a court of equity.
- 5th. A decree of the Court of Chancery, passed under the act of 1785, ch. 72 sec. 4, appointing the trustee named in the will, trustee for the sale of the real estate devised by the will, invested him with all the power which he would have had under the will, and imposed upon him the same obligations by which he would have been bound by the will.
- 6th. The trustee having paid into court the proceeds of the real estate, in pursuance of the order of the Chancellor, he is not responsible afterwards to any person who may establish a claim to them, as he acted under the authority of a court of competent jurisdiction.

It is the duty of an executor to use dispatch in the settlement of the estate; the period allowed by law for that purpose is not a prescribed delay, but rather a restriction of it.

Where the same person is both trustee and executor under a will, and settles up the personal estate in the Orphans Courts, the balance, after such settlement, remains in his hands as trustee, and not as executor.

There is no special power or jurisdiction given to the Orphans Courts over a trust created by a will for the support of minor children, and that court has no general jurisdiction over trusts.

Accounts passed by administrators and executors in the Orphans Courts, are themselves *prima facie* evidence of their correctness.

The executor or administrator administers the estate *in pais*, and the obligation is upon him to ascertain the individuals entitled to legacies, distributive shares and residues, and not upon the Orphans Court.

The power given by the act of 1798, ch. 101, to distribute the surplus is not the same as that to pass the claims of creditors, or make allowances in the settlement of the estate.

An order of the Orphans Court, directing an executor to pay "to the guardian of the minor children of G. and M. the property in his hands, to which said children are entitled under the will of H. M.," where the executor has not complied with requisitions of the 12th sec. of the 14th sub ch. of the act of 1798, ch. 101, will not protect him in the payment of a balance of money in his hands as executor, against the claims of other parties than those for whose benefit he paid the same.

The 12th section of the 15th sub ch. of the act of 1798, ch. 101, applies only to contested questions, *inter partes*, and not to *ex parte* proceedings.

Wherever there is a suit in Chancery, by an executor or any person interested in the estate, for the administration of the assets, and the executor pays either to creditors, legatees, or distributees, by order of the court, he is protected by the order.

But the Orphans Courts have no jurisdiction, except what is given by the legislature, and they must exercise the powers given in accordance with the grant.

A testatrix, after bequest of some specific articles of plate, bequeathed as follow, "the rest of my plate I should wish to be divided among the children of my daughter, unless my trustees should think it most advisable to sell it for their use." **HELD—**

That the residue of the plate so bequeathed, vested immediately on the death of the testatrix in the children of her daughter then born, and the power to the trustees to sell does not extend to the death of the daughter, but must be exercised within a reasonable time : but jewels cannot be deemed plate.

[Mrs. Henry Margaret Ogle, by her last will, executed on the 7th of April, 1814, devised as follows :

"I give and devise all my estate, real, personal and mixed, (except what shall be hereafter mentioned,) to my son Benjamin Ogle, my son-in-law John Tayloe, and my friends Richard

Tasker Lowndes and George Calvert, and to the survivors and survivor of them, and the heirs of the survivor in trust, to pay all my just debts and funeral expenses as soon as practicable after my decease, and in a manner most advantageous to my estate ; and secondly, in trust, to apply the said estate and the rents and profits thereof, to the support and maintenance of my daughter, Mary Bevans, during her life, and the support and maintenance and education of her children, free from the power and control of her husband, and from and after her death, in trust, for her children, to be equally divided amongst them, as tenants in common, and to their respective heirs ; and in case at any time hereafter it would, in the judgment of my trustees, or a majority of them, or the survivors or survivor of them, best promote the objects of the trust hereby created, to sell all, or any part of my estate, then, I hereby authorize my trustees, or a majority of them, the survivors or survivor of them and the heirs of such survivor, to sell and convey all or any part of my said estate, and to vest the proceeds in lands or banks, or other moneyed institutions, and apply from time to time, the rents, profits, interests or dividends thereof, to my said daughter and her children, in the manner hereinbefore directed, free from the power and control of her said husband, my trustees taking care that the children of my said daughter be well maintained and educated, and after her death, the whole to be equally divided amongst them. If any child dies during the mother's life, leaving children, then the said children to take and stand in the place of their deceased parent. To my daughter, Ann Tayloe, I leave my diamond and pearl hoop rings, and breast pin, and two silver goblets, gilt on the inside. To my son Benjamin Ogle, I give my large silver watch, with the Ogle arms in the middle, as a small remembrance : to my daughter-in-law, Anna Maria Ogle, I give my silver bread-basket. To my daughter, Mary Bevans, I give all my clothes, and what new things I may have by me, likewise my bed and furniture, window curtains and chair covers, alike my easy chair and cradle, and the chairs in my room, my silver coffee-pot, pudding dish, skillet and dozen of each sort of spoons, the plate at her

death to her children. To Laura Bevans, Mr. Harford's picture, set with diamonds, and I beg George Ogle Bevans may have a gold watch as soon as he is old enough to take care of it, and my seals. All my sheets, table linen and quilts, I give to Mary Bevans. To Laura my writing desk, and looking glass, and dressing table, and two silver sauce-boats. The rest of my plate I wish to be divided among the children of my daughter, Mary Bevans, unless my trustees should think it most advisable to sell it for their use. I appoint my above named trustees the executors of this my last will and testament."

By a codicil, executed on the 23d of June, 1815, the testatrix manumitted her negro man, Cæsar, and gave him an annuity of \$20 per annum, during his life, also her negro man Orson, and her negro cook, Nan Bowser, and gave each an annuity of \$10 per annum, during their lives; also her negro girl, Nance, whose freedom was to commence on the 1st of January, 1818, and requested these devises to be scrupulously carried into effect.

By another codicil, dated the 28th of July, 1815, the manumission of the negro girl, Nance, was postponed until the 1st of January, 1820, and her services in the mean time were bequeathed to Laura Bevans and Mary R. Bevans, daughters of Mary Bevans.

At the date of the above will, Mary Bevans, the daughter of Mrs. Ogle, was the wife of George Bevans, who died during the lifetime of the testatrix. The said George and Mary Bevans had four children, George O. Bevans, Laura Bevans, John T. Bevans and Mary Ridout Bevans, all of whom, with their said mother, were living at the death of the testatrix, who died shortly after the date of the last codicil above mentioned.

On the 30th of August, 1815, the will was admitted to probate in the Orphans Court of Anne Arundel county, and the other persons named in the will as trustees and executors having declined those trusts, letters testamentary were thereupon granted to Benjamin Ogle, who, on the 14th of September, 1816, returned an inventory of the personal estate, and on the 24th of February, 1816, passed a final account in said Orphans Court,

showing a balance in his hand due the estate of \$7425 48½, and on the 27th of February, 1816, the said court passed the following order :

“Ordered by the court, that Benjamin Ogle, administrator with the will annexed, of Henry Margaret Ogle, pay over and deliver unto John Addison, the guardian of the minor children of George and Mary Bevans, the property in his hands to which said children are entitled under the will of said Henry Margaret Ogle, and take said guardian’s receipts for the same, agreeably to law.”

On the same day, acting under the authority of this order, the said Benjamin, as executor, delivered to the said guardian, various articles which were specifically bequeathed to the children, \$150 in money, and sundry bonds or notes taken for the property sold, to the amount of \$5929 20, and took his receipt therefor.

On the 15th of September, 1815, Benjamin Ogle, as next friend of the above mentioned four infant children of Mrs. Bevans, filed a petition in Chancery, suggesting that all the trustees named in the will of their grandmother had declined the trusts confided to them, and praying that he might be appointed trustee to sell the real estate of the deceased, agreeably to the spirit and intention of her aforesaid will. A copy of the will was exhibited with this petition, and on the same day the Chancellor, (*Kilty*,) after stating that he had read and considered the petition and the will accompanying it, passed a decree “that the real, personal and mixed estate, whereof Henry Margaret Ogle, died seized, and which by her will was directed and authorized to be sold, be accordingly sold.” The decree then appointed Benjamin Ogle trustee to make the sale, prescribed the terms thereof, and directed the trustee to “bring into this court the bonds taken on the sale, together with the purchase money arising from the said sale, to be applied under the Chancellor’s direction according to the will.”

The trustee gave bond as such, and on the 23d of October, 1815, reported a sale of part of the real estate for \$6760, cash, and on the 15th of November following, he made a further re-

port of the sale of the residue thereof, part for \$17,865 12½, on a credit of twelve months, for which he had taken the bonds of the purchaser, and the rest for \$23,400, cash. In his last report, the trustee states that Mrs. Anne Ogle has a claim by mortgage against the said estate amounting to \$28,885. The sales were ratified by the Chancellor, on the same days on which they were reported, the Chancellor remarking in his order of ratification, "that the trustee for making the sale, being one of the trustees named in the will of H. M. Ogle, and the devisees entitled to the greatest part of the proceeds being minors it is not thought necessary to have the usual publication made."

On the 22d of the same month, (November, 1815,) Mrs. Anne Ogle filed in the cause a petition, exhibiting her mortgage, and praying that the trustee be directed to pay the same out of the proceeds of sale, and on the day following, in pursuance of an order of the Chancellor to that effect, the trustee paid to Mrs. Anne Ogle the sum of \$28,988 81 in full of her claim.

On the 1st of December, 1815, the Chancellor passed an order in the cause, authorizing the trustee "to deposit in the Farmers Bank of Maryland, any money arising from the sale of the real estate, not appropriated, which is to be placed to the credit of the real estate of H. M. Ogle." And shortly thereafter, the trustee deposited in said bank, \$17,562 89, the residue of the proceeds of the real estate, after deducting his commissions and expenses.

On the 25th of January, 1816, Mrs. Mary Bevans filed a petition, praying that so much of the proceeds of sale "may be vested in the hands of a trustee, and appropriated under the direction of the Chancellor, the clear annual profits of which shall suffice for a suitable maintenance to the petitioner." And on the same day an order was passed, in which the Chancellor expressed his opinion that the annual sum of \$580 should be appropriated to the petitioner for her maintenance; "the said sum to be paid to her by the trustee in such proportions, and at such times as he may think proper, subject to any future order, and the said trustee is authorized, from time to time, to invest a

sufficient part of the proceeds of the estate to raise the said sum in government or bank stock." The trustee, Benjamin Ogle, declined this trust, and by another order passed on the 28th of February of the same year, (1816,) the Chancellor appointed John Addison trustee, in place of said Ogle, under said order.

About this time Mrs. Bevans intermarried with James Conner, and on the 29th of February, 1816, the Chancellor passed another order, directing a check for the money in bank to be drawn in favor of said John Addison. "He will apply as much thereof as may be necessary to the payment of the annuity to Mrs. Bevans, now Mrs. Conner, with such commission as may be allowed, and the rest as guardian to the infants. The Register is directed to draw a check on Farmers Bank of Maryland, in favor of John Addison, or bearer, for \$17,562 89, out of the money deposited to the credit of the real estate of H. M. Ogle, the said John Addison being trustee under the order of this court, and guardian to George Bevans and others." A check was drawn accordingly, and the money paid over to the said John Addison, who purchased, as trustee of Mrs. Conner, 145 shares of the stock of the Farmers Bank of Maryland, at a cost of \$8,618, and as guardian of the four Bevans, 268 shares, at a cost of \$15,113, making a total investment of \$23,731, exceeding the proceeds of the real estate by \$6,168 11, which represents the personal estate received by him from the executor. Of this stock he transferred on the 10th of August, 1825, to Laura Bevans 81 shares, to Mary R. Bevans 87 shares, and on the 21st of November, 1833, to John T. Bevans 26 shares. The remaining 74 shares he sold from time to time as the exigencies of the trust required. His accounts as guardian show a balance on the 9th of January, 1825, in favor of Mary R., John T. and George O. Bevans, of \$3,867 20 each, and in favor of Laura Bevans, \$3,566 93. George O. Bevans died in 1825, and the said John Addison became his administrator, and distributed his estate, giving \$1,218 11 to each of his surviving sisters and brother. Mary R. Bevans intermarried with William C. Ogle in December, 1834, and died the year following, intestate and without issue, and after her death a greater

part of the 87 shares of stock of the Farmers Bank of Maryland, standing in her name, were transferred into the name of her surviving husband.

By her marriage with Conner, Mary Bevans, the daughter of the testatrix, had five children, viz. Emma, born in 1818, and died intestate and without issue in 1837. James Thomas, born in 1821, Harriet, born in 1823, and died a year or two thereafter, Henrietta, born in 1825, and Benjamin, born in 1830.

On the 11th of June, 1828, Benjamin Ogle, as executor of Mrs. H. M. Ogle, passed in the Orphans Court of Anne Arundel county an additional final account, charging himself "with cash received for negroes under the treaty of Ghent, \$3,402, and showing a balance in hand due the estate of \$3058 01, and on the same day the said court passed the following order: "Mr. Ogle, as executor of his mother, will charge himself with the net amount he received for the twelve negroes belonging to her estate, and he is allowed 10 per cent. commission upon that amount, inasmuch as the court would have allowed that commission in case the negroes had been returned in the inventory. The six negroes that were devised to Mrs. Bevans do not belong to Mrs. Ogle's estate, but to Mrs. Bevans for her life, and after her decease to her children, equally of course. The money received for them ought to be so invested that Mrs. Bevans (now Conner) may derive the benefit or receive the interest, and after her decease the principal to go to her children in the same way that the negroes would have done if they had remained in the state of Maryland." The negroes referred to in this order had been carried away during the late war with England.

On the 1st October, 1828, the Orphans Court made distribution of the above balance in the hands of the executor, giving to Mrs. Conner one-third thereof, \$1,019 33 $\frac{1}{3}$, and to Mary R., Laura and John T. Bevans, \$679 55 each, being the residue thereof. On the same day, Benj. Ogle, as executor of his mother, passed a further additional final account, in which he charges himself "with cash received for negroes under the treaty of Ghent, \$1,291 68," and showing a balance due the estate of \$1,030 34, which, on the same day, was by order of the court distributed,

one-third to Mrs. Conner, \$343 44, and the residue to Mary R., Laura and John T. Bevans, giving to each \$228 97.

On the 23d of October, 1835, upon application of Mrs. Conner and her husband, Dr. John Ridout was appointed, by order of the Chancellor, trustee for Mrs. Conner, in place of John Addison, who had recently died, and duly qualified as such.

Mrs. Conner died in July, 1842, and on the 11th of June, 1844, John T. Bevans filed a petition in the cause alleging that he and his sister Laura Bevans, were, under the will of their grandmother, solely entitled to the stock held by the said Ridout, in trust for his mother during her life, and praying that the Chancellor would direct the trustee to divide the same between them. This petition was answered by the Conners, the children of the second marriage, who insisted that by the will of their grandmother, they, as well as the Bevans, were entitled to the support, maintenance and education out of the income of the trust estate therein provided for the children of Mrs. Bevans, during the life of their mother, and after her death, to an equal distributive share of the principal fund. Upon this petition and answer, the Chancellor, (*Bland*,) on the 20th of November, 1844, passed the following important order.

“Ordered, that this case be, and the same is hereby referred to the Auditor, with directions to state an account or accounts making a distribution of the estate among the said parties, from the proceedings and proofs now in the case, and from such other proofs as may be laid before him. According to the terms of the bequest of the testatrix, Henry M. Ogle, deceased, her daughter Mary, and all her children, as well those of her second as of her first marriage, are entitled to participate in the benefit of nothing more than the rents, profits, interests and dividends arising from the property bequeathed, during the lifetime of Mary, giving to each of her children a due proportion thereof, for the purposes of its maintenance and education, only during its minority, from the time of its birth or death of the testatrix, until its death, or the marriage of a female, or the death of its mother; and for this purpose all payments of such profits to the mother, or by the said trustees, for such

maintenance and education, are to be regarded as proper applications thereof. But as it appears to have been the intention of the testatrix, that no part of the capital or principal of the property bequeathed shall be so applied to the use of the said Mary or her children, the Auditor will charge each of the children with so much of such principal as he or she may have received, and award to him or her nothing, until the other children may have awarded to them an equal amount from the estate now to be distributed. So much of the rents, profits, interest or dividends of the estate as accrued and became demandable and payable to the said Mary, for the use of herself and her infant children, during her lifetime, and which were not paid to her, must be awarded to her husband, the said James Conner. Subject to such directions, a distribution of the whole estate is to be now made among the children of the said Mary, who were alive at the time of her death, and of such of them, if any, who may have died before that time leaving issue. The present trustee is hereby allowed a commission of six per cent. on all sums collected and disbursed by him, and the Auditor is hereby directed to state an account in the manner before mentioned, showing the amount now in his hands, to the end that the same may be brought in or disposed of as the court may direct, and the said trustee discharged. And the parties are hereby authorized to take testimony in relation to said accounts before any justice of the peace, on giving three days notice as usual, provided that such testimony be taken and filed in the chancery office on or before the first day of January next."

The result of the account stated by the Auditor, in conformity with the above order, was that the whole of the stock which had been invested for the benefit of Mrs. Conner was distributed amongst the three surviving children by Conner, giving to each \$2,872 66 $\frac{2}{3}$.

Benjamin Ogle, the trustee and executor named in the will of the testatrix, died in April, 1844, leaving a will, by which he devised a life estate to his widow, Anna Maria Ogle, in all his real and personal estate, and after her death the same to be

equally divided among his two sons, and appoints his said wife his executrix, to whom letters testamentary on his personal estate were duly granted.

On the 7th of October, 1844, James T., Henrietta M. and Benjamin O. Conner, and Thomas E. D. Poole as administrator of the deceased children, Enima and Harriet Conner, filed their bill against Laura Bevans, John T. Bevans, William C. Ogle, surviving husband of Mary R. Bevans, Anna M. Ogle, executrix of Benjamin Ogle, and the two sons and devisees of said Benjamin Ogle, and Dr. John Ridout, for an account and distribution of the estate of the deceased Henry Margaret Ogle.

This bill, after setting out the will of Mrs. Ogle, and the proceedings thereunder as above stated, exhibits the accounts of Benjamin Ogle as executor, and charges that it appears by them that there is due by said executor to the personal estate of the deceased the sum of \$11,513 84. It then avers that these accounts contain many improper and illegal allowances, and in illustration thereof, states that in the first account the executor is allowed for advances made to Mrs. Bevans, then Conner, and her children \$620 90 out of the principal of the estate, whereas no part of said principal was authorized by the will so to be paid or expended for the said Mary or her children, but only the rents, profits, interest or dividends thereof. It also charges that large sums of money, in principal and interest and guarantees of personal property, were received by the executor, belonging to the said personal estate, which have not been accounted for by him, or have been illegally and contrary to the directions of the said will, misapplied.

That Benjamin Ogle and others, having charge of the property, have wholly neglected the directions of the will as to the support, maintenance and education of the children of said Mary, no part of the same having ever been expended in the maintenance or education of the children of said Mary by Conner, but all aid or assistance to them has been positively and continually refused by the said Benjamin Ogle. That he

hath not properly and legally accounted for the proceeds of the said real and personal estate which came or should have come to his hands as trustee and executor as aforesaid, never having paid any part thereof to the Conners. That most of said real and personal estate hath been, in the lifetime of the said Mary Conner, by gross violation of duty and breach of trust of said Benjamin Ogle, and by his conspiracy with the children of the said Mary by her former husband, and others, to injure and oppress the complainants, misapplied and illegally appropriated in a greater or less amount, to the exclusive use and advantage of the children of the said Mary by George Bevans, her former husband; whereas, no part of the principal thereof could legally be divided until the death of the said Mary, and on that event should all have been divided equally among all the children of said Mary, including complainants. That a portion of the money so bequeathed to all the children of the said Mary, was illegally and in violation of his duty as trustee, invested by Benjamin Ogle in the purchase of a tract of land in Frederick county, in his name, to be held by him in trust for the use of said Mary Conner during her life, and after her death, in trust for her surviving children by her former husband, Bevans. A copy of the deed conveying the land is exhibited with the bill.

The bill then prays that Anna M. Ogle, as executrix of Benjamin Ogle, may account for the personal estate, and proceeds of the real estate of Henry M. Ogle, received by him as executor and trustee, with such interest as he should be chargeable with, and that Laura Bevans, John T. Bevans and William C. Ogle, as representing his deceased wife, Mary R. Bevans, may account for the sums of money and property paid over and conveyed to them severally as parts of the estate of the said testatrix, and the profits thereof, and that the land in Frederick county so purchased by Benjamin Ogle, and conveyed to him in trust, may be assured to complainants, or sold for the purposes of division, and for general relief.

The answer of Mrs. Anna M. Ogle, as executrix of Benjamin Ogle, relies upon the facts before stated in relation to the

sale of the real estate and the application of the proceeds thereof by her testator under the direction of the Court of Chancery, as a complete discharge of his estate from all further accountability therefor. She avers that the personal estate which came to the hands of her testator has been accounted for, and in reference to the items of allowance in the final account made to or for Mrs. Bevans, she avers they were for the necessary subsistence of those parties, and insists that at this time every presumption ought to be made in their support. She insists, likewise, that the Orphans Court had authority, under the circumstances, to direct the executor to make moderate advances for the mother and children, for their reasonable and necessary subsistence. She relies upon the order of the Orphans Court, directing Benjamin Ogle to pay over the personal estate of his testatrix to John Addison, as guardian to Mrs. Bevan's children, and the actual payment thereof to Mr. Addison, as discharging him from all further liability on account of the balance of personal estate, shown to be in his hands by the final account. She avers her belief that the entire balance was paid over to the guardian, and insists that in the absence of proof to the contrary, and after the lapse of time and death of the executor and guardian, it ought to be presumed that the accounting between them was complete, and that the entire balance was paid over. She relies on the second and third administration accounts, passed in the year 1828, the order of the Orphans Court, and the distribution made pursuant to that order, as a full administration of the funds received under the provisions of the treaty of Ghent.

The answer of Laura Bevans, which, by agreement, is to be treated as the answer of John T. Bevans, insists that upon the proper construction of the will of Henry M. Ogle, deceased, the principal estate was distributable amongst the children of Mrs. Bevans, in being at the death of the testatrix, or, if the disposition in regard to the principal estate were contingent until the death of Mrs. Bevans, the estate vested in her children living at her death, and in either event Poole, as administrator of the deceased children, could have no title. She admits that

Benjamin Ogle, as executor, made payments to her guardian, and to her on account of her share of the personal estate of the testatrix, and that other moneys, parcel of the proceeds of the real estate, were likewise paid out of the Court of Chancery to her guardian. All these payments she insists were rightly made. She admits that she has received from her guardian a large sum of money. She settled with him without examining strictly into the state of his accounts, and her religious avocations since that time, (she being a nun professed,) have left her neither time nor inclination to ravel into accounts which she has always believed were settled rightly by her guardian. She denies her liability to account for or restore any part of the moneys which she has received. She avers that a considerable part of the profits of the estate have been applied to the maintenance and education of Mrs. Conner and her children, the complainants, and that said profits have been adequate to sustain the said children as comfortably and as creditable in every respect as the other children have been sustained, so that the said Conners have no cause to complain on this ground of the application of any part of the funds. She denies that she is accountable for the interest or profits received on the fund distributed to her since said fund, if not rightfully distributed, was at least distributed under an impression and conviction entertained by all parties that it was so distributable, and the same has been used and employed by her as her own, and the profits expended by her under a conviction that they were her own absolute right.

William C. Ogle, by his answer, admits that in December, 1834, he intermarried with Mary R. Bevans, and that she died in the the following year intestate and without issue. He admits that his deceased wife in her lifetime did receive from her guardian or some other person as her part of the trust estate eighty-seven shares of the stock of the Farmers Bank of Maryland, and took for the residue a note from the executor, amounting to about \$900. But he denies that he is responsible for said sum of money or property in any manner whatever. He insists that the estate was rightfully distributed by courts of competent authority, and that the claims of the complainants, if they ever had any against him, are barred by limitations.

The Chancellor (Johnson) having been counsel for complainants, referred the case on the 1st of February, 1849, to the *Honorable Nicholas Brewer*, an Associate Judge of the Third Judicial District, who delivered the following opinion, and passed the following order, on the 2d of March, 1849.]

This case was referred to me, as an Associate Judge of the third Judicial District, by the certificate of his Honor, the Chancellor, on the first of February last, and being ready for hearing, was fully argued on both sides.

Mrs. Henry M. Ogle, on the 7th day of April, 1814, executed her last will, and died on the 14th day of August, 1815. By her will she "devised all her estate, real, personal, and mixed, to her son, Benjamin Ogle, and three other trustees, to them, the survivors of them, and the heirs of the survivors, in trust, to pay all her just debts and funeral expenses, as soon as practicable after her decease, and in the manner most advantageous to her estate; and secondly, in trust, to apply the said estate and the rents and profits thereof, to the support and maintenance of her daughter, Mary Bevans, during her life, and the support and maintenance and education of her children, free from the power and control of her husband, and from and after her death, in trust for her children, to be equally divided amongst them, as tenants in common, and to their respective heirs, and in case at any time thereafter it should, in the judgment of her trustees, or the survivor or survivors of them, best promote the objects of the trust thereby created, to sell all or any part of her said estate, then she authorized her trustees, or a majority of them, the survivor or survivors of them, and the heirs of such survivors, to sell and convey all or any part of her said estate, and to vest the proceeds in lands, or banks, or other moneyed institutions, and apply from time to time, the rents, profits, interests, or dividends thereof, to her said daughter and her children, in the manner hereinbefore directed, free from the power and control of her said husband, her trustees taking care that the children of her said daughter be well maintained and educated, and after death the whole to be equally divided amongst

them; if any child die during the mother's life, leaving children, then the said children to take and stand in the place of their deceased parent."

The same trustees were appointed her executors. Three of the trustees declined the trust and executorship, two by letters of the 23d of August, addressed to B. M. Ogle, and the third, by signing a written paper, on the 29th or 30th. The will was proved by Samuel Ridout, one of the witnesses, and the executor, B. Ogle, who took out letters testamentary on the 14th September, 1815, he returned an inventory: on the 15th, a petition was filed in the Chancery Court, by the children of Mrs. Bevans, by B. Ogle, as their next friend, setting forth the will and death of Mrs. Ogle, and that the said trustees, appointed as aforesaid, by the said will, had declined acting in pursuance of the authority thereby vested in them, by reason whereof, the provisions of the said will, which were designed for the benefit of your orators, had failed to be effectual, and the benevolent intentions of the testatrix toward the orators, would be frustrated. They, therefore, pray that Benjamin Ogle may be appointed trustee, for the sale of all the above mentioned real estate, agreeably to the spirit and intention of the aforesaid will.

On the same day the petition was filed, a decree passed for "the sale of the real, personal and mixed estate, whereof the said H. M. Ogle died seized, and which by her will was directed or authorized to be sold;" on the 23d of October, 1815, the trustee reported the sale of a house and lot in Annapolis, which was on the same day ratified by the Chancellor without the usual publication: "the trustee making the sale, being one of the trustees named in the will of H. M. Ogle, and the devisees entitled to the greatest part of the proceeds being minors."

On the 15th of November, 1815, the trustee reported a sale of the residue of the real estate, which was ratified by the Chancellor on the 22d, also without the usual publication. "The devisees entitled to the greatest part of the proceeds being minors, and the trustee being their nearest relative, and the only person whose duty it would be to object to the sale if not advantageous."

On the same day that the last sale was ratified, Anne Ogle filed her petition praying that a certain mortgage debt, being a lien on part of the premises sold, should be paid. The original mortgage was exhibited with the petition, as appears from the Chancellor's order on it, though not referred to in the petition, and appearing to have been filed on the 23d. On the same day (22d November) the Chancellor ordered the trustee to pay to the petitioner the sum of £10,890 16s. 4d.—\$28,988 81—by assignment of bonds or in money, or both, which was paid, per receipt on the mortgage, on the 23d.

The residue, deducting commissions, was all paid into court in pursuance of the Chancellor's order of December 1st, 1815.

On the 25th of January, 1816, Mrs. Bevans files her petition in the Chancery Court, stating that the balance of the proceeds of the real estate, after the payment of debts, was about \$24,562, and prays that so much of the said sum may be vested in the hands of a trustee and appropriated under the Chancellor's direction, the clear annual profits of which shall suffice for a suitable maintenance to your petitioner. To this B. Ogle annexed an answer, admitting the facts and consenting to the appropriation. On the same day, the Chancellor passed an order appropriating so much as would annually produce the sum of \$580—to be invested by the trustee; but the trustee, in writing, without date, declining to act as trustee relative to the appropriation made to Mrs. Bevans, and praying the Chancellor to appoint some other person, he, on the 28th of February, 1816, appointed John Addison, of Prince George's county, trustee, in the place of the said Benjamin Ogle, under the said order; and on the 29th, directed a check to be drawn in favor of Addison for the money in bank, he applying so much as may be necessary to the annuity to Mrs. Bevan, now Mrs. Conner, and the rest as guardian to the infants. The whole amount was paid over accordingly to Addison, and thus was the whole amount of the real estate disposed of.

Nothing further was done in Chancery in reference to the real estate until 1835, except the filing on the 4th of March, 1819, a petition (or memorial, as he calls it,) by B. Ogle as

brother and next friend of Mrs. Bevans, praying that a part of the money invested for her should be converted into land—which, on the 6th, the Chancellor decided could not be done on that petition, B. Ogle having declined the trust.

On the 24th of February, 1816, B. Ogle passed his first and final account as executor in the Orphans Court of Anne Arundel county, leaving a balance of \$7425 48. On the 27th, the Orphans Court passed an order directing the executor to pay over and deliver unto John Addison, the guardian of the minor children of George and Mary Bevans, the property in his hands to which said children are entitled under the will of H. M. Ogle, and on the same day the executor paid over property and notes to the amount of \$5929 20. Whether the whole has been paid is a matter of dispute.

On the 11th of June, 1828, a paper was left on file in the Orphans Court of Anne Arundel county, by B. Ogle, showing himself as executor of H. M. Ogle, to have received for eighteen slaves the net sum of \$3402 00, paid under the treaty of Ghent, upon which the court passed an order the same day, directing him to charge himself for the net amount received for twelve negroes belonging to her estate, and stating that the six negroes that were devised to Mrs. Bevans do not belong to Mrs. Ogle's estate, but to Mrs. Bevans for her life, and after her decease to her children equally. Of course the money received for them ought to be so invested that Mrs. Bevans, now Mrs. Conner, may derive benefit or receive interest, and after her decease, the principal to go to her children in the same way that the negroes would have done, if they had remained in the state of Maryland.

In pursuance of this order, he passed his final account on the same day, showing the balance to be divided; and on the 1st of October of the same year, passed an additional final account of a further sum from the same source, and on the same day distributions were made, giving to Mrs. Bevans one-third of each balance and dividing the residue between her children, the the Bevans. Her part was invested in the land in Washington county, and the portion of her children paid over to them.

In 1844, after the death of Mrs. Bevans, a petition was filed in the name of the Conners, her children by a second marriage, claiming to be equally entitled with the Bevans to the estate of H. M. Ogle, upon which the Chancellor passed an order, November 20th, 1844, deciding that, "according to the terms of the bequest of the testatrix, H. M. Ogle, deceased, her daughter Mary and her children, as well those of her second as of her first marriage, are entitled to participate in nothing more than the rents, profits, interest and dividends arising from the property bequeathed during the lifetime of Mary, giving to each of her children a due proportion thereof, for the purposes of maintenance and education only during its minority, from the time of its birth or death of the testatrix, until its death or the marriage of a female, or the death of its mother, and for this purpose all payments of such profits to the mother, or by the said trustee for such maintenance and education, are to be regarded as proper applications thereof. But as it appears to have been the intention of the testatrix that no part of the capital or principal of the property bequeathed should be so applied to the use of the said Mary or her children, the Auditor will charge each of the children with so much of said principal as he or she may have received, and award to him or her nothing until the other children may have awarded to them an equal amount from the estate now to be distributed. So much of the rents, profits, interest or dividends of the estate, as accrued and became demandable and payable to the said Mary, for the use of herself and her infant children, during their lifetime, and which were not paid to her, must be awarded to her husband, the said James Conner. Subject to these directions, a distribution of the whole estate is now to be made among the children of the said Mary, who were alive at the time of her death, and of such of them, if any, who may have died before that time leaving issue."

The first question to be considered in this case is, in what relation did Benjamin Ogle stand to the children of Mrs. Bevans in the receipt and distribution of the real and personal estate of H. M. Ogle? He was, by her will, appointed one of four trus-

tees and executors, to whom full power was given for the sale, conveyance and disposition of her whole real, personal and mixed estate, agreeably to its provisions. Three of these trustees renounced their trust and executorship. Benjamin Ogle took out letters testamentary on the personal estate, and might alone have performed all the duties of the trust without an application to the court of equity, 1 *Powell on Mortgages*, 279, *et seq.* What his actual intentions were, with regard to the whole trust, is not very clear; and he does not appear to have acted under any legal advice in the commencement of his proceedings in or out of court.

His first step after taking out letters testamentary and returning an inventory of the personal estate, without any positive disclaimer as to the trust, or any explicit disclosure of his opinion as to his right under the circumstances to act as such, was to file on the 15th of September, 1815, a petition in the Chancery Court, in the name of the children of Mrs. Bevans, by him as their next friend, and signed by him, in which it is stated, "that the several trustees appointed as aforesaid, by the said will, have declined acting in pursuance of the authority thereby vested in them, by reason whereof the provisions of said will, which were designed for the benefit of your orators, have failed to be effectual," &c., the prayer of the petition being for the appointment of B. Ogle, trustee for the sale of the real estate only.

This petition is the act of the infants, yet it may be treated in some measure as his act, and as a sort of renunciation of the trust under the will, and an attempt to obtain a new appointment confined to a portion of the subject matter of the trust. The proceeding, however, was one sanctioned by the act of 1785, ch. 72, sec. 4, authorizing the Chancellor, in such cases, to appoint a trustee, for the purpose of selling and conveying such property, and applying the money arising from the sale to the purposes intended; and the Chancellor, treating it as such, passed his decree "for the sale of the real, personal, and mixed estate, of which the said H. M. Ogle died seized, and which by her will was directed or authorized to be sold." This decree

invested him with all the power which he would have had as the only acting trustee under the will, or which the whole of the trustees would have had if they had accepted the trust, and it also imposed upon him the same obligations by which he or they would have been bound, except in so far as he may have been subsequently discharged from them by the court; it also gave the court full control of the trustee and the trust property.

Let us next, then, examine his liabilities as to the real estate, and how he has been acquitted of them; he proceeded to sell the whole real estate, and the sales were confirmed; no account was stated of the proceeds of the sale, but part of them was paid to a creditor of the deceased, Mrs. Ann Ogle, by the Chancellor's order, and the residue (except a sum barely sufficient to pay his commissions and expenses) was also, by the Chancellor's order, paid by him into court, and subsequently, also, by the Chancellor's order and Register's check, paid over to John Addison, as trustee for Mrs. Mary Bevans, and guardian to her children.

This whole fund having been paid over by the trustee of the court, in pursuance of the order of the court, it is impossible to conceive that he should afterwards be responsible to any person establishing a claim to it, nor did I understand the solicitor of the complainants as insisting upon that point. He seemed to think that some part of the proceeds of sale had not been accounted for, though he was not able to designate it clearly. But that evidently is not the fact; the whole fund is accounted for, and if any money was received from Howard Duvall, on his purchase of land from the testatrix and her husband, it became a part of the personal estate in the hands of the trustee and executor.

No fraud is charged against B. Ogle, but he is charged with great precipitancy in the settlement of the estate, and a combination with the Bevans to give the whole estate to them. It is the duty of a trustee and executor to use dispatch in the settlement of the estate confided to his trust; the period allowed by law to the latter for that purpose, is not a prescribed delay, but rather a restriction of it.

No doubt the trustee acted with great and unusual imprudence, in undertaking and hastening the settlement of so large an estate without the advice of counsel, as he seems to have done ; but that affords no reason why he should be treated with more severity than other trustees, or deprived of any reasonable presumption in his favor.

There is no evidence of any combination with the Bevans, to give them a greater part of the estate than they were entitled to. They were, in fact, too young to have participated in any scheme of the kind. The estate was nearly closed before Mrs. Bevans married again, and the proceeds of the real estate were paid over, and the final settlement of the personal estate made before there was any issue of the marriage.

The trust fund paid over, remained for a considerable time in the hands of the guardian, yet no attempt was made to assert the right of the complainants, which has since been established, nor even for a considerable time after the receipt of it from the hands of the guardian.

From all this, it is evident that the children of Mrs. Bevans, living at the death of Mrs. Ogle, were considered by the trustee and their mother, and the Chancellor himself, to have been entitled to the whole, and there is nothing to show that a contrary opinion was entertained by any one, until the proceedings instituted in this court, at a late period, after the death of their mother, or a short time before, on the petition of J. Bevans ; although this ignorance of the law may not exempt the trustee from any liability, it contains no ground for treating him with harshness.

Let us now inquire into the liabilities of B. Ogle to the complainants, arising from his administration of the personal estate. It is now settled by the Chancellor's order of November 20th, 1844, and the proceedings in the petition case, and admitted in argument, that the complainants, children of Mrs. Bevans by her second husband, were equally entitled with those of the first to maintenance and education, out of the interest of the trust fund, and to a distributive share of the principal after the death of their mother. It seems to have been the desire of B. Ogle, from the first, to rid himself of the protracted trust contemplated

by the will of H. M. Ogle. He took out letters testamentary on the personal estate of the Orphans Court, and returned an inventory there. He filed the petition in the Chancery Court, in the name of the infants, stating that the several trustees had declined the trust, and praying that he might be appointed trustee to sell the real estate; after paying the only debt which the personal estate was inadequate to discharge, he deposited the residue in court, declined acting as trustee for the investment of the funds appropriated to secure the annuity to Mrs. Bevans, and procured the payment of the funds deposited to the guardian of the Bevans. He proceeded, in the mean time, to settle up the personal estate "as executor," in the Orphans Court, and to pay over the balance on the final account, under the directions of that court, to the persons by him and them believed to be entitled to it. But has he divested himself, by these proceedings, of the character of trustee, as to the personal estate, either under the will or under the decree?

There is no positive and direct disclaimer by him of the trust, to be found in any part of his proceedings. The strongest fact from which a disclaimer may be inferred, is the allegation by the infants in the petition for the sale of real estate, signed by him as their next friend, and which allegation he may therefore be presumed to have sanctioned, that the several trustees had declined to act; but this inference, it seems to me, could thence be fairly made only as to the real estate, as the real estate only was therein prayed to be sold, and although in the disposition of the personal estate he seems to have acted generally as if he conceived himself no longer under the obligations of the trust, yet, in some instances at least, paying to Mrs. Bevans \$600, for the maintenance of herself, and education and maintenance of her children, he assumed the character of trustee. Whatever his intentions and desires were, however, and whether he had declined the whole trust under the will or not, the Chancellor's decree on the petition deprived him of it. His appointment was by the court, and his powers were, from that time, derived from, and dependent upon its decree; and what is the decree of the court? not that he shall sell the real estate, and bring

the money into court to be disposed of under the direction of the Chancellor, but that he shall sell the real, personal, and mixed estate whereof H. M. Ogle died seized, and which by the will was directed and authorized to be sold, and directs him to bring the money into court, to be applied under the Chancellor's direction, according to the will.

The decree was passed under the act of 1785, ch. 72, sec. 4. The petition was not an application by the trustee, nor by parties interested against the trustee, to administer the estate in the Chancery Court, and the Chancellor had no other authority to pass the decree but that derived from the act of 1785, and it imposed upon the trustee precisely the same obligations that were imposed upon him by the will.

Upon the petition of Mrs. Bevans to have a certain amount invested for her maintenance, the trustee, B. Ogle, declined acting as trustee, relative to the appropriation to Mrs. Bevans, made by the order of January 25th, 1816, and the Chancellor, by order of February 28th, reciting the first order, and the trustee's declining to act, appointed another trustee in the place of the said B. Ogle, under the said order, which, though an unusual proceeding, certainly left B. Ogle in the exercise of all his functions as trustee, except those which by the last order were transferred to another person, and though by depositing in court all the proceeds of the real estate then sold, not disposed of by the Chancellor, he was, as to that, free from any further responsibility as to them, yet any other fund proceeding from the real estate, and the residue of the personal estate, after the payment of the creditors, he was still bound to preserve and dispose of under the trust.

Admitting that he had, notwithstanding the decree of the Chancery Court, the power to dispose of the personal assets in the payment of debts in the Orphans Court, yet when they were paid, and a final account passed, the residue in his hands was a trust fund, to be administered as such. If there had been another trustee, it should have been paid over to him; but B. Ogle being both executor and trustee, the residue remained in his hands as trustee. 6 *H. & J.*, 162; 3 *Har. & McH.*, 179; 2

G. & J., 220; 6 *G. & J.*, 25; and to exonerate himself from liability, he must administer it according to the trust, or under the authority of a competent tribunal. I have been able to find no special power or jurisdiction given to the Orphans Court over a trust of this kind, and that the court has general jurisdiction over trusts, even of personal estate, is not contended.

Treating the personal estate of Mrs. Ogle as legal assets, to be administered under the authority of the Orphans Court, and subject to its jurisdiction in the same manner as the personal estate of deceased persons usually is, let us see what the jurisdiction is with regard to a surplus after the payment of debts, and whether it has been properly exercised to the exoneration of the executor from any further claims? The surplus is, of course, to be distributed among the next of kin or legatees.

By whom? By the act of 1715, ch. 39, the Commissary General had power to make, or cause to be made, distribution of the surplus and transmit the account to the County Court. By the act of 1777, ch. 8, the Orphans Court, then constituted, were not required to transmit balances, but were given the same power as the County Court, nothing being said of the power to make distribution. These laws are superseded, however, by the act of 1798, ch. 101, and the whole subject is regulated by it. The power given by that act to distribute the surplus is not the same as that to pass the claims of creditors, or make allowances in the settlement of the estate. It has been decided by the Court of Appeals, in the case of *Owens vs. Collinson*, 3 *G. & J.*, 38, referred to by defendant's solicitor, and also in other cases, that the accounts themselves are *prima facie* evidence of their correctness. The right to pay claims of creditors depends on sub ch. 8, sec. 22, which provides that no executor or administrator shall discharge any claim against the deceased (otherwise than at his own risk) unless the same shall be passed by the Orphans Court, or unless the said claim be proved according to the following rules: And the court says, "the irresistible inference is, that if any executor or administrator *bona fide*, without knowledge of its injustice, pay a claim thus passed or proved, that the payment is not at his own risk." Sub ch.

11 provides "that when all the debts, &c. are paid, the administrator shall proceed to make distribution as follows." Sub ch. 10, sec. 6, "when it shall appear by the first or other account of an executor or administrator, with the will annexed, that all the claims, &c. have been settled, it shall be his duty to deliver up the estate in his hands to those entitled." By sub ch. 14, sec. 12, "any executor or administrator shall be entitled to appoint a meeting of the creditors or of persons entitled to distributive shares, or legacies, or a residue, on some day by the court approved, and passage of claims, payment, or distribution may be there made under the court's direction and control."

The chapter and section relied on by the defendant's counsel are sub ch. 15, sec. 12, "that the Orphans Court shall have full power, authority and jurisdiction to examine, hear and decree upon all accounts, claims and demands existing between wards and their guardians, and between legatees or persons entitled to any distributable part of an intestate's estate, and executors and administrators, and may enforce obedience to, and execution of, their decrees in the same ample manner as the Court of Chancery may." Secs. 16 and 17 of this sub ch. 15, provide for plenary proceedings and appeal.

It appears to me that the sections referred to in sub chs. 10 and 11, clearly indicate the obligation of the executor or administrator to ascertain the individuals entitled to legacies, distributive shares and residues. The Orphans Court are not required to do so by any part of the act, and it would be a strange duty to require of them, or of any court. They act, as other courts, upon the evidence produced to them. He administers the estate *in pais*. If he doubts as to who are entitled to distribution, legacy or residue, or in what proportions, by sub ch. 14, sec. 12, "he may appoint a meeting of the claimants, and payment or distribution may be made under the court's direction and control." In most cases he would be safe in acting under that direction and control; but he must show that the meeting was duly appointed, notification of some kind given to the parties interested, and the case presented to, and acted upon by the court. Whether he would have been safe

in this case, if these requisites had been complied with, is not clear ; but in fact they were not complied with. All that appears to have been done after the passing of his final account on the 24th February, 1816, the balance of which appears to be money, is an order of the Orphans Court on the 27th, directing him "to pay over and deliver to John Addison, the guardian of the minor children of George and Mary Bevans, the property in his hands, to which said children are entitled under the will of H. M. Ogle." No time appointed, no notification to any body, so far as appears, nothing to show that the question as to who was entitled to the whole surplus was ever presented to or acted upon by the court. No distribution of the whole sum between the Bevans ; no order to pay over the balance due on the final account, nor any reference to it ; but simply an order to pay over and deliver to their guardian the property in his hands, "to which the said children are entitled." What specifics he had in hand, and to which the term "property" might be more fitly applied than to a money balance, did not appear ; but the receipt shows that some such were in his hands, and might satisfy the terms of the order. We must, therefore, conclude, that this order did not, by its terms, authorize B. Ogle to pay over the balance due on his final account to the Bevans, and that if it did, the court had no authority to pass the order. The attention of the court was particularly directed to the 12th sec. of the 15th sub ch., being the one relied upon by the distinguished counsel of the defendants to sustain his view of the jurisdiction of the Orphans Court ; but after all the reflection and consideration which it has been able to bestow upon it, it has satisfied itself that it applies only to contested questions *inter partes*, not to *ex parte* proceedings, and that opinion is confirmed by the 16th and 17th sections providing for plenary proceedings.

The cases referred to from English reports, 3 and 7 *English Ch. Reps.*, 326, 328 ; 2 *Ball & Beatty*, 337 ; 1 *Reeve, &c.*, all establish the principle, that wherever there is a suit in Chancery, either by the executor or any person interested in the estate, for the administration of the assets, and the executor

pays either to creditors, legatees or distributees, by order of the court, he is protected by the order—the court having full jurisdiction in the matter and the executor compelled to obey, and all persons interested, being either parties or having notice given in the usual manner to present their claims, a decree of the ecclesiastical court is also conclusive on the parties, and cannot be reversed by the Chancery Court.

In one of the cases, the Chancellor says, he “never heard of such a case. What executor would be safe, if he was liable to answer for a distribution of assets made under a decree of the court?” All these cases apply to our Chancery Court, having general jurisdiction in matters of trust, and therefore, the trustee, B. Ogle, is safe in having paid over the proceeds of the real estate in pursuance of the Chancellor’s order, although that order was erroneous. But the Orphans Court has no such jurisdiction; none, indeed, except what is given it by the legislature. It is expressly forbidden by sub ch. 15, sec. 20, of 1798, ch. 101, to exercise any other; see also *Scott vs. Burch*, 6 H. & J., 79; 2 H. & G., 120. The powers, if given, must be also exercised in accordance with the grant, which we have seen has not been done in this case.

The distributions made in 1828 are liable to most of the objections to the authority of the court, and with greater force, some of the complainants being then *in esse* and infants. The complainants living at the death of Mrs. Bevans, are entitled to an account of the personal estate of H. M. Ogle, against the personal representatives of B. Ogle, as executor and trustee, and are entitled to their proportion of the balance of his final account, passed the 24th February, 1816, and also their proportion of the amount distributed between the Bevans, on the 1st day of October, 1828. The amount allowed to Mrs. Bevans, he would seem at present not to be accountable for, but as that may be elucidated by further testimony, no decision will be made on that point until the Auditor’s accounts are returned. In taking the account, B. Ogle will be chargeable with any amount which can be shown to have been received by him, or which he ought to have received from Howard Duvall.

It is evident that some amount has been paid to B. Ogle, or to S. Ridout, for him ; what amount does not appear, but may possibly be proved hereafter. He is also to be charged with the value of the negroes attempted to be manumitted who were above the legal age.

B. Ogle ought not to be charged for the advances made to Mrs. Bevans, for the maintenance of herself and children before the settlement of the estate, and which have been allowed by the Orphans Court. No other allowance for that period having ever been made, it appearing to have been a reasonable sum, and they being entitled to maintenance from the death of Mrs. Ogle, after such a lapse of time and the death of the executor, it must be presumed that there was evidence of its payment and of the necessity of its being paid, although the Orphans Court had no right to allow it, it being paid in execution of the trust, not of his duty as administrator. It is contended by the complainants that it ought to have been paid out of the interest, and that the principal of the estate could not be applied to that purpose.

The will actually authorizes the "trustees to apply the said estate and the rents and profits thereof to the maintenance of Mrs. Bevans, and her children," and although it appears from the latter part of the will to have been the intention of the testatrix that the interest and profits alone should be applied to that purpose, after they should have been received, I do not see how, from the expressions of the will, we could refuse to allow a payment made for that purpose out of the principal at that early period, and probably before any interest could be made. Besides, the executor accounted for some profits of the estate nearly enough to cover that payment, and which, though certainly legal assets as to creditors, for such a purpose as they have been applied to, ought to be considered profits.

The residue of the plate bequeathed to the children of Mrs. Bevans, vests, immediately on the death of Mrs. Ogle, in the children then born. The power of the trustees to sell it for their benefit, does not extend to the death of Mrs. Bevans, but

must be exercised within a reasonable time. Jewels cannot be deemed "plate."

B. Ogle is chargeable with interest on each child's part from the time he or she attained the legal age, and was no longer entitled to be maintained, on all the balances of his accounts in the Orphans Court on such sums as he should have accounted for as trustee or executor, from the time he should have settled the estate, or if received after that time, from six months after he received them.

The whole interest on the said balances may be considered as applied to the maintenances of the Bevans, agreeably to the Chancellor's order of November 20th, 1844, (by the principles of which I mean to abide,) until the birth of any one of the Connors, such an one is then entitled (agreeably to said order) to a due proportion thereof. What that proportion is cannot at present be ascertained. The will required that the children should be well maintained and educated, and the interest does not appear to have been an extravagant allowance for that purpose.

After the Bevans attained their majority, the interest being no longer applicable to their maintenance, should have been applied to the maintenance of the Connors, as required, and not having been so applied, they are entitled to receive it now. So far as that interest should have been received by those who have died, are their representatives entitled to an account, and no further.

John T. and Laura Bevans must account for the whole amount received by them from B. Ogle, over and above what it appears they should have received from the whole trust estate and the specifics to which they were entitled, with interest from the time it could be no longer appropriated to their maintenance. They are liable each, only for the amount received by him or her.

William C. Ogle is not responsible for any sum received by his wife, and *appears* to have no interest whatever in the land conveyed to B. Ogle, in trust; the bill as to him should be dismissed.

It is, therefore, this second day of March, 1849, by Nicholas Brewer, Associate Judge of the third judicial district, and by

the authority of the Chancery Court, adjudged, ordered and decreed that the defendant, Anna Maria Ogle, as executrix of Benjamin Ogle, account with the complainants for the proceeds of the real and personal estate of H. M. Ogle, both as to the trust, and executorship of said B. Ogle, and that the said John T. and Laura Bevans, account with them for the portions thereof improperly received by them. And that the Auditor, in stating the account, be governed by the principles herein decided; all questions which have arisen or may arise in the case, and not herein decided, are reserved until the final decree.

It is further adjudged, ordered and decreed, that the said Anna Maria Ogle, as executrix of Benjamin Ogle, account with the complainants for the personal estate of the said Benjamin Ogle, and any of the parties are hereby authorized to take testimony in relation to the said accounts and matters reserved before the Auditor, on the usual notice, or before any justice of the peace, on giving three days notice as usual. It is further adjudged, ordered and decreed, that the bill be, and the same is hereby dismissed as to the trustee, Doctor John Ridout, and the defendant, Wm. C. Ogle, with costs.

[From this order the defendants, except Dr. Ridout and Wm. C. Ogle, appealed. The cause was argued in the Court of Appeals, at its December term, 1850, before *Spence, Martin and Frick*, Judges, by *Thos. S. Alexander* for Mrs. Ogle, *Davage and Semmes* for Laura Bevans, *Cornelius McLean* for Wm. C. Ogle, and by *Oliver Miller and Alexander Randall* for the appellees. The court affirmed the order "*for the reasons assigned by the court below.*" The following is the decree of the Court of Appeals in the case:

"This appeal having been argued by counsel for the parties, and fully considered by the court. It is, therefore, this twenty-sixth day of June, in the year eighteen hundred and fifty-one, by this court adjudged, ordered and decreed, that the decree of the 2d of March, in the year eighteen hundred and forty-nine, from which this appeal is taken, be, and the same is hereby affirmed, with costs of this appeal. In so doing, it is proper for

this court to add, that they understand the judge below as releasing Anna M. Ogle, as executrix of Benjamin Ogle, from responsibility for such proceeds of the real estate as have been accounted for and paid over by him, or brought into the Court of Chancery, in pursuance of the orders of that court, and the cause is remanded to the Chancery Court."

GEORGE W. SPENCER AND OTHERS

vs.

WILLIAM A. SPENCER AND JOHN
SPENCER, EXECUTORS OF
ISAAC SPENCER AND OTHERS.

SEPTEMBER TERM, 1847.

[CONSTRUCTION OF WILL—LIMITATIONS.]

A TESTATOR devised all his estate, real, personal and mixed, to his brother in fee, "on these terms and conditions," viz. "after all my debts are paid, he is to call in two discreet persons to make an estimate of the real value of all my estate," and then adding to his own children two sons of the testator's deceased brother, and a son of his niece, he is to ascertain "what my estate will divide into," and pay to each of the three last named parties on their arrival at twenty-one "a sum that will put them each on a footing with his own children." **HELD—**

1st. That the estimate of his property is not to be made irrespective of the debts of the testator, but exclusive of them, and by accepting this devise, the testator's brother did not become personally bound to pay the legacies above directed whether the estate was sufficient to pay its debts or not.

2d. The acceptance of this devise by the testator's brother, did not operate as an extinguishment of a debt due by the testator to him, and the legatees have no right to plead the statute of limitations against his claim, either as to the real or personal estate, he alone having the right to interpose this plea to claims against the testator.

As a general rule, where lands are devised charged with the payment of a legacy, and the devisee accepts the devise, he becomes personally liable for the legacy, and must pay it whether the property devised be of less or greater value.

Where an executor is himself the creditor of the estate, limitations will not bar his claim, for he cannot institute suit against himself for the recovery of the debt.

By our testamentary system, the executor or administrator alone can plead limitations to claims against the personal estate of the deceased.

A trust in a will to pay debts, against which the statute of limitations has run at the death of the testator, will not revive them; but the trustee alone has the authority to plead it.

[The facts of this case are fully stated in the opinion of the Chancellor.]

THE CHANCELLOR:

On the 10th of December, 1834, the complainants filed their bill in this court, praying for relief against the representatives and devisees of Isaac Spencer, deceased.

It appears by the proceedings that William Spencer, of Kent county, departed this life in the month of March, 1822, having on the 3d of the same month duly made and published his will, containing the following provisions.

“I give and bequeath to my brother, Isaac Spencer, and his heirs and assigns forever, all my estate, real, personal and mixed, on these terms and conditions.

“After all my debts are paid, he is to call in two discreet persons (and he may consult the Orphans Court, if he may see proper, as to the persons) to make an estimate of the real value of all my estate, real and personal, and then adding to the number of his own children then living the two sons of my lamented brother, Jervis Spencer, George and William Spencer, and William Knight, son of my beloved niece, Charlotte Ringgold Knight, he is to ascertain what my estate will divide into, taking into consideration his own children then living, and the three above named, if alive, or so many as may be alive, and he is to pay to each of my brother's children, and to William Knight, a sum that will put them each on a footing with his own children on the arrival of the said George Spencer, William Spencer and William Knight at the age of twenty-one years, without interest, taking into consideration the full value of all my estate, real and personal, and in case either the said George Spencer, William Spencer, or William Knight die before their arrival at the age of twenty-one years, my brother, Isaac Spencer, is absolved from the payment to any other person of such sum as the deceased would have been entitled to. But my brother, Isaac Spencer, is at full liberty to devise all my estate, real and personal, after complying with the foregoing provisions, to whomsoever he may see proper, but I should like, though I do not

enjoin it upon him, to give the whole, real and personal, to his son, Isaac Spencer, and to his eldest male heir forever, with a request from me that he will act a kind brotherly part by his brothers and sisters, as their situation and need may require.

“It is my further wish that no part of my property be sold at public sale, as I believe all my debts may be paid from the proceeds of my estate in the year 1823, if not before, and none of my negroes to be sold out of the state, except for gross misconduct. Any useless or surplus property can be disposed of at private sale.”

This bill was filed by George Spencer, one of the sons of the testator's brother, Jervis, and William A Knight, the son of his niece, Charlotte Ringgold, who, together with *William Spencer*, the other son of the said Jervis Spencer, were by the will of the testator, William Spencer, to be put upon a footing of equality with the children of Isaac Spencer, the devisee.

It alleged that the said Isaac, who was appointed sole executor of the will of William, the testator, entered upon and took possession of his estate, real and personal, and received the rents and profits thereof, but that he caused no valuation of the estate to be made, as directed by the said will; that he sold a portion of the real estate much below its actual value, and has mismanaged and wasted the personal estate to a large amount.

That he, the said Isaac Spencer, died on or about the 1st day of November, 1832, leaving a will duly executed, devising and bequeathing his whole estate, including that which he acquired from the said William Spencer, to his children and heirs at law, making William A. Spencer and John Spencer, two of them and two of the defendants, his executors, to whom also letters of administration, *de bonis non*, upon the estate of the said William Spencer have been granted.

The complainants allege that they have arrived at age, but that they have received no benefit from the devise of William Spencer in their favor, either from the said Isaac Spencer, or from his executors, devisees or heirs at law, and they pray an account and payment and for general relief.

The answer of the defendants admits the death of William

Spencer as stated, and that he died seized and possessed of certain parcels of real and personal estate which, by his will, passed to his brother, Isaac Spencer, the father of the defendants. That by the will of William Spencer, his estate was charged with the payment of all his debts, and that after they should be paid (and not before) the valuation and payment spoken of in the will was to be made. That no valuation of the estate of William Spencer was made, as directed by his will; first, because, even if it had been sufficient to pay his debts, its embarrassments were such that time adequate for the purpose was not allowed; and secondly, because the personal estate was overpaid to the amount of upwards of \$30,000, including a large debt due to the said Isaac himself, and that besides this overpayment, large claims still remain unsatisfied. That in respect to these overpayments, Isaac Spencer is to be regarded as a creditor of the real estate of William, after deducting the sum of \$5,000, received from the sale of a portion of his real estate, situate in Queen Anne's county, which was sold by the said Isaac. That in paying off this large sum, beyond the value of the personal estate of his testator, the said Isaac was compelled to part with portions of his own estate, and to incur heavy individual liabilities. The defendants deny that the annual proceeds of the estate of William were, or even could, in any period of time be rendered adequate to the payment of his debts, the same not being sufficient to keep down the annually accruing interest. They also deny that the real estate which was sold was sold at an undervaluation, or that there has been any mismanagement of the personal estate. They admit the death of Isaac Spencer in 1832 as alleged, and that he left a will, devising and bequeathing his estate to his children, the defendants, as stated in the bill. That he constituted two of the defendants, William A. and John Spencer, his executors and the trustees of his real estate, of which they have taken possession, and that complainants have not received any benefit from the devise in their favor in the will of William Spencer, because, as the defendants insist, nothing will remain of his estate after the payment of his debts. The defendants, though they deny the right of the complainants

to call upon them for an account, proceed nevertheless to state what they believe to have been its annual value during the life of Isaac Spencer, and since his death, and they admit that letters *cum testamento annexo, de bonis non*, on the estate of William have been granted to William A. and John Spencer, two of the defendants.

It appeared by an account passed by Isaac Spencer, as executor of William Spencer, on the 4th of January, 1825, in the Orphans Court of Kent county, that the personal estate of the deceased had been overpaid the sum of \$3,506 16. The assets, according to this account, consisting of the inventory and cash received by the executor, amounted to \$9,886 28.

It also appeared that on the 31st of July, 1835, the additional account of the said Isaac as such executor, returned by William A. and John Spencer, was passed by the Orphans Court, showing an overpayment of \$30,673 21. In this account additional assets to the amount of \$1,285 06 are charged, and besides the overpayment above stated, credit is taken for \$1200 on account of runaway slaves, and for the sum of \$17,534 52 appearing to be due the accountant, Isaac Spencer, as per a contract exhibited and passed by the Orphans Court on the 27th of March, 1825.

The contract on which this credit was claimed, bears date on the 27th of June, 1803, and is signed and sealed by William Spencer and Isaac Spencer. It evidences that Isaac had sold to William certain parcels of land belonging to the former in Queen Anne's county, "Conden," "Conden Renewed," "Crompton," "Pearl," and "Sandy Hurt," for the sum of £2500, bearing interest from the 24th of November, 1802, and fifty cords of wood. Isaac Spencer agreeing to take in part the bond of Nathaniel Peacock for \$2000, "and to receive other good bonds for the balance, payable in 1, 2, 3, 4 and 5 years," on payment of the purchase money the title to be conveyed.

Sundry credits are endorsed upon this contract, the first on the 4th of April, 1804, and the last on the 21st of January, 1822.

The complainants pleaded limitations against this claim, as

well as against all the claims for which credits are allowed in the additional administration account, and they excepted to the said last account on several grounds.

It appeared, among other things, by an admitted statement of facts, that all the negroes belonging to the estate of William Spencer, appraised at \$1200, absconded soon after his death, and were finally lost, though legal measures were taken to recover them, by his executor, Isaac, and the validity of a large amount of claims against the estate of the former, as paid by the latter, was also admitted, and that at the time of filing the bill, sundry suits at law and equity were depending against the said Isaac, as executor and devisee of the said William; and the due execution of the contract on which the claim for \$17,534 52 was allowed in the Orphans Court was also admitted, and that the credits endorsed thereon are in the handwriting of Isaac Spencer. That the lands mentioned in said contract are the same which came to the hands of Isaac after the death of William Spencer in Queen Anne's county, and described in the proceedings as the "Crompton Estate," and which were sold as aforesaid by the said Isaac, and conveyed by him to the purchasers thereof, but that no deed of the same from Isaac to William can be found. The deed from Isaac Spencer to the purchasers of this land, John A. Hopper and others, is dated the 17th of September, 1831, and is for the consideration of \$5000.

It was also admitted that upon the petition of William A. and John Spencer, trustees and executors of Isaac Spencer deceased, filed in the Orphans Court of Kent county, on the 20th of June, 1843, that court passed an order appointing John Carroll Sutton and Thomas J. Mann, to estimate the value of the lands of which William Spencer died seized in the year 1822, as of that year, in virtue whereof, on the 24th of June, 1843, they made an estimate by which they valued his lands in Kent county, containing a little upwards of 1200 acres, at \$12 per acre, and his lands in Queen Anne's county, containing between twelve and sixteen hundred acres, at \$5 per acre, making an aggregate of \$20,922 57, or about that sum.

Under the commissions which have been issued for the purpose, a vast mass of evidence has been collected, the effect of which has been very fully and ably argued by the counsel of the parties, as has also been the construction which should be put upon the will of William Spencer, which lies at the foundation of the controversy.

It is insisted, upon the part of the complainants, that the value of the estate of the testator, William Spencer, should be ascertained at or about the year 1823, the period at which he supposed his debts might be paid, and that they are entitled to two twelfth parts of that value, irrespective of any debts which may have then or may now remain unpaid. That the estimate of the value of the estate of the testator, spoken of in his will, was to be made without regard to his debts, be they great or small, and that these complainants, together with the children of Isaac Spencer, are entitled to be paid their aliquot parts of that estimate when they should attain the age of twenty-one years, though the debts of the estate should exceed in amount the value of his entire estate.

The argument in support of this proposition is, that the language of the will not only makes the sums to be paid to these legatees a charge upon the estate, but by accepting the devise, Isaac Spencer, the devisee, made himself personally responsible, and that being so responsible, he must pay though he loses money. That a devisee who takes and enjoys an estate under a devise like this, must comply with the condition though the value of the property is less than the charges upon it.

It is a general rule, certainly, that when lands are devised, charged with the payment of a legacy, and the devisee accepts of the devise, he becomes personally and absolutely liable for the legacy, and consequently, whether the estate is adequate or not to the payment of the legacy is immaterial. By accepting such a devise, the legacy becomes the personal debt of the devisee, and he must pay it, though the property devised to him be of less or greater value. *Glen and wife vs. Fisher*, 6 *Johns. Ch. Rep.*, 33; *Birdsall vs. Hewlett*, 1 *Paige*, 32; *The Attorney General vs. Christ's Hospital*, 3 *Brown's Ch.*

Rep., 165; *Messenger vs. Andrews*, 3 *Eng. Cond. Chancery Rep.*, 761.

But it seems to the Chancellor, that this case is clearly distinguishable from all those which have been cited in support of the proposition contended for. In all of them real estate was devised upon condition that the devisees should pay the plaintiff certain pecuniary legacies of *ascertained amounts*, and by accepting the devises the devisees became personally bound, upon the principle that he who takes a benefit under a will must conform to all its provisions, and set up no rights inconsistent with them. But this will presented no such condition to the devisee, Isaac Spencer. It did not say to him you shall have my estate, real and personal, upon condition that you pay the complainants and the other parties interested certain specified sums of money. Its language is, "after all my debts are paid, you are to call in two discreet persons (consulting if you please the Orphans Court as to the persons) to make an estimate of the real value of all my estate, real and personal," and then, at a certain period, that value so ascertained was to be paid by the devisee in equal portions to the complainants and certain other persons described in the will. It is true the testator expressed an opinion that his debts could be paid at a very early day, without selling any portion of his estate, but still the estimate of the value was to be made after the payment of the debts, and it was only what should remain after such payment that was to be valued and paid to the complainants and the other parties.

The terms employed by the testator in effect are these: you are to pay my debts first and then you are to cause a valuation of my property to be made, and the amount of such valuation you are to pay to certain parties in the proportions designated by me. It seems impossible to say that by accepting such a devise as this, Isaac Spencer became bound to pay the entire value of the estate of William to the complainants and others, without regard to the debts. If such had been the intention of the testator, and if he had designed to put any such alternative to his devisee, why not direct a valuation to be

made immediately after his death, instead of postponing it until after the payment of his debts? Why, indeed, say anything at all upon the subject of debts, when the estimate, according to the argument of the complainants, was to be made, wholly irrespective of them?

Upon this first point, then, I am of opinion that the estimate directed to be made by William Spencer of the value of his estate, was not to be made irrespective of his debts, but that the sum, to a portion of which the complainants are entitled, is to be ascertained by deducting from such estimate the amount of the debts.

The next point discussed has reference to the credit of \$17,534 52, allowed in the additional account passed on the 31st of July, 1835.

To the allowance of this credit a number of objections are urged.

1st. It is insisted that the devise to Isaac by William Spencer, is to be taken as a satisfaction of this debt upon the principle that where a debtor bequeaths to a creditor a legacy equal to or exceeding the amount of his debt, it shall be presumed, in the absence of any intimation of a contrary intention, that the legacy was meant by the testator as a satisfaction of the debt.

Though such a rule as the above does prevail in courts of equity, it is certain that it has been much censured, and that very slight circumstances have been permitted to rescue particular cases from its operation. I am of opinion that some one or more of the exceptions to the rule as stated in 2 *Williams on Executors*, 805, 806, apply to this case, and that consequently the devise to Isaac Spencer is not to be regarded as a satisfaction of the debt due him. See also *Partridge vs. Partridge*, 2 *Har. & Johns.*, 63; and *Owings vs. Owings*, 1 *Har. & Gill*, 484, 491.

It is also insisted that this claim is barred by lapse of time, and the act of limitations relied on by the complainants.

I am clearly of opinion, that so far as the personal estate is concerned, the objection cannot be sustained, as the creditor

being himself the executor, could institute no suit for the recovery of the debt. *State, use of Stevenson vs. Reigart*, 1 *Gill*, 1. Besides, by our testamentary system, the interposing the plea of limitations is referred to the honesty and discretion of the executor or administrator, and he, and he alone, can make the objection. *Act of 1798, ch. 101, sub ch. 9, sec. 9.*

But with regard to the right of these complainants to file this plea for the protection of their interest, whatever it may be, in the real estate of William Spencer, more doubt may be entertained.

It seems to be settled that a trust in a will to pay debts upon which the statute of limitations has closed at the time of the death of the testator, will not revive them. This is the conclusion to which Chancellor Kent came after an examination of all the cases, and I am aware of no decision in this state or elsewhere to the contrary since. *Roosevelt vs. Mark*, 6 *Johns. Ch. Rep.*, 266, 293. The opinion of the Chancellor is in accordance with the decision in *Burke vs. Jones*, 2 *Ves. & Bea.*, 275, which he considered as announcing and establishing the true and reasonable doctrine upon the subject.

It might, perhaps, be questioned whether the statute of limitations had actually taken effect upon this claim at the death of William Spencer. The contract upon which it is founded does not very clearly specify when the money for the land sold by Isaac to William Spencer was to be paid. The agreement provides that Peacock's bond for \$2000, and other bonds payable in 1, 2, 3, 4 and 5 years, shall be taken by the vendor in satisfaction of the purchase money, but there is no engagement on the part of the vendee to pay at a specified period, nor does it clearly appear at what time an action could have been instituted by Isaac Spencer upon this contract, and until then, of course, limitations did not begin to run. It is possible that no suit could have been brought against William Spencer upon this contract, until proceedings had been exhausted upon the bonds of Peacock and others.

The defendants, however, insist, that conceding that the statute of limitations had taken effect upon this claim before

the death of William Spencer, still these complainants have no right to interpose the plea, because by the will creating a trust in Isaac Spencer to pay the debts of the testator, he, and he alone, had authority to plead it.

In the cases referred to by the complainants' counsel, the plea was put in by the trustees charged with the payment of the debts, and I incline to think, if waived by them, it cannot be relied upon by others. In *Burke vs. Jones*, 2 Ves. & Bea., 278, the implication is very strong that in a will creating a trust for the payment of debts, the discretion in regard to the payment is given to the executor of the testator, and that upon the executor alone the power is conferred to rely upon the defence of limitations. The language of the Vice-Chancellor is, "the executor is not directed expressly to plead the statute, nor is there any implication of such intention, but it is to take the ordinary course; his debts are to be discharged, *but the investigation of them is left to the executor*, under the direction of the courts of law and equity." Again: "the plain line is that the testator intends the courts of law and equity to determine what are just debts, *leaving his executor at liberty to use all means of resistance prescribed or allowed by the law.*" *Ibid.*, 290, 291.

Looking to the language of this will, I am of opinion that the testator designed to confer upon Isaac Spencer a discretion which allowed him to pay such debts as he might deem honest, and that it is not competent for these complainants, not only without the consent of the trustee and executor, but in opposition to a claim due him, to rely upon this defence.

The case of *Sheriff vs. Wilson*, decided by the Court of Appeals, at December term, 1841, is, in some respects, very much like the present, and may, I think, be regarded as sanctioning the doctrine that when a trust is created by a will for the payments of debts, the trustee is the only party who can put in this plea. Under such circumstances, the trustee must be regarded as the person whom the testator selects for the protection of his entire estate, real and personal, and with reference to both as standing in the relation which an executor stands to the personal estate.

I am of opinion, therefore, that the act of limitations is no bar to this claim as pleaded by the complainants, either as to the real or personal estate of William Spencer.

In further answer to this plea, the defendants contend, and with much force, that as the complainants read the credits endorsed on the contract between Isaac and William Spencer, for the purpose of getting the benefit of them, they are thereby precluded from relying upon the defence of limitations, the last of these credits being as late as January, 1822.

The *third* question presented by this record, and argued by the solicitors, has relation to a credit claimed by the defendants for moneys paid by them under the decree in the case of *Spencer vs. Pearce*, reported in 10 *Gill & Johns.*, 294. To this claim for a credit, so far as concerns the money received by the late William Spencer, the Chancellor understands there is no objection; but the complainants insist that no credit should be allowed for the amount which was lost by what is alleged to have been the neglect of Isaac Spencer and his representatives in suffering the land sold to Terry by William Spencer to remain in the possession of the former from 1822, when William Spencer bought it at the sheriff's sale, to 1839, when it was sold under the decree of the Court of Appeals.

The Chancellor has examined this question, and he thinks the defendants are not entitled to this credit. There was, in this respect, he thinks, a want of that diligence which a trustee is bound to exercise when he undertakes a trust. The cases referred to in 2 *Williams on Executors*, 1110, are believed to sustain this position.

The *fourth* question which I am called upon to decide is, whether Isaac Spencer is to be charged only with the \$5000 for which he sold what is called the "Crompton Estate," in September, 1831, or with \$10,000, which it is alleged he was offered or might have sold it for at an earlier period.

As however, the order which I am about to pass will direct the value of the estate after deducting the debts to be ascertained as of the year 1822, there does not appear to be any necessity for the expression of an opinion upon this point.

The *fifth* and last question relates to the mode in which the value of the estate is to be ascertained.

My opinion is that the nearest approximation to the justice of the case will be attained by making an average of the testimony of the various witnesses who have testified upon the subject, and that mode will accordingly be adopted by the Auditor in taking the account which will be directed.

The defendants' counsel have insisted very strenuously that inasmuch as it is apparent (as they say) that the entire estate was inadequate to pay the debts at the death of William Spencer, no account should be ordered.

But the Chancellor has not the materials before him upon which he can safely rest a judgment upon this subject, and the case must, therefore, go to the Auditor for the purpose of stating such account or accounts as may be required to present the case in a form for final decision.

Since the argument in this case, the administrator of Jervis William Spencer has been made a party in conformity with the suggestion of the court, made shortly afterwards.

This case standing ready for hearing, and having been argued by the solicitors of the parties, the proceedings have been read and considered, and for the reasons stated, the Chancellor is of opinion that the cause must be referred to the Auditor, with directions to state such account or accounts as may be necessary to exhibit the rights of the parties, as those rights are herein adjudged by the court, and may appear by the evidence.

It is, thereupon, this 16th day of November, in the year 1847, ordered and adjudged that this cause be, and the same is hereby referred to the Auditor, with directions to state an account or accounts, according to the following directions, that is to say, he will ascertain the value of the estate of the late William Spencer, real, personal and mixed, which came to the hands of his executor and trustee, the late Isaac Spencer, at the period of the death of the said William, in the year 1822. This ascertainment is to be made by an average of the evidence of the several witnesses who have testified upon the subject.

The Auditor will also ascertain from the proof the amount

of the debts of the said William Spencer at the same period, including the amount which may have been due the said Isaac at that time upon the contract between him and the said William Spencer, dated the 27th of June, 1803, which the Chancellor thinks should be allowed.

In determining the amount of the credit to be allowed on account of moneys paid, or to be paid, by the defendants, or any of them, under the decree of the Court of Appeals, in the case of *Spencer vs. Pearce*, decided by that court in 1839, the Auditor will exclude such portion of the money so paid, or to be paid, as was lost by the neglect or omission of the said Isaac Spencer or his representatives, to take possession of the property mentioned in the proceedings in that case, in the year 1822, and in permitting it to remain in the possession of Benjamin Terry from that time until the year 1839. And it is further adjudged and ordered, that the accounts so to be taken shall be stated from the pleadings and proofs now in the cause, and such other proofs as may be laid before the Auditor by parties, and the parties are hereby authorized to take depositions before any justice of the peace, on giving three days notice, as usual, to the opposite party, or his or their solicitor, provided the said depositions are taken and filed in the Chancery office on or before the 1st day of January next.

OTHO SCOTT and JAMES A. PEARCE, for Complainants.

THOS. S. ALEXANDER and WM. A. SPENCER, for Defendants.

[No appeal was taken from this order.]

RICHARD W. GILL AND HENRIETTA M. HALL, ADMR'S OF SOMERVILLE PINKNEY, vs. WILLIAM D. CLAGETT.	}	SEPTEMBER TERM, 1847.
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[MISTAKE.]

If parties come to a settlement upon terms mutually agreed upon, and error or mistake occur in the settlement, a court of equity will rectify it and make it conform to the intention of the parties.

Equity will, upon sufficient parol proof, reform a contract or settlement in writing upon the ground of mistake, and then enforce its executions as thus reformed, though the answer denies the mistake. But strong proof must be adduced to overrule the answer denying the mistake.

[The facts of this case are sufficiently stated in the following opinion of the Chancellor, delivered on the 5th of November, 1847, and in 2 *Md. Ch. Decisions*, 151, and *ante*, 153, where other opinions in the same case are reported.]

THE CHANCELLOR :

This case is submitted to the court upon written arguments by the solicitors of the parties.

It is conceded, indeed it could not be denied, that courts of equity have jurisdiction in cases of mistake, and it is equally well settled, that if parties come to a settlement upon terms mutually agreed upon, and error or mistake occur in the settlement, a court of equity will entertain a bill to rectify the settlement and make it conform to the intention of the parties. It was at one time much doubted whether it was competent for a plaintiff who sought the specific performance of an agreement in writing to vary it by parol proof upon the ground of mistake, and then after having it thus corrected to insist upon its execution, and this right of a plaintiff was especially questioned when the answer of the defendant denied the mistake. These doubts, however, have been removed by the decision of Chancellor Kent, in the case of *Gillespie vs. Moon*, 2 *Johns. Ch. Rep.*, 585, and by the Court of Appeals, in the case of *Moale*

vs. *Buchanan*, 11 *Gill & Johns.*, 314, and it must now be regarded as established that a court of equity will, upon sufficient proof, grant relief to a plaintiff by reforming a contract or settlement in writing upon the ground of mistake, and then enforce its execution as thus reformed, though it is undeniably true that strong proof must be adduced to overrule the answer denying the mistake.

It appears in this case, that a bill was filed as early as November, 1832, by the complainant, Henrietta Hall, and her then husband against the defendant, Clagett and Charles Hill, which upon appeal to the Court of Appeals from the decree of the Chancellor in favor of the complainants, was remanded to to the Court of Chancery, under the act of 1832, ch. 302, for further proceedings. That the defendant, Hill, being by the opinion of the Court of Appeals exonerated from responsibility, and the husband of the complainant having died, terms of compromise were proposed and agreed upon between the parties to this suit, and that on the 27th of February, 1842, a meeting took place for the purpose of arranging the details thereof, and coming to a settlement. At this meeting a statement was prepared according to which there appeared to be due from the defendant to the complainant, Hall, the sum of \$674 86, for which amount, the said defendant gave to Somerville Pinkney, Esq., acting as the solicitor and agent of the complainant, his note, payable six months after date, with interest from date, and at the same time, defendant signed a paper by which it was agreed that any error which might have occurred in the settlement should be corrected, provided such error should be ascertained before the maturity of the note. Allowing the days of grace, this note became due on the 30th of August, 1842, four days before which, to wit, on the 26th of the same month, the present bill was filed, alleging very material errors in the settlement, and praying that it be reformed and executed according to the terms of the compromise and intentions of the parties.

The terms of the compromise, as stated in the bill, are denied by the answer, which alleges an agreement to adjust the controversy between the parties upon different principles. The

answer also states, that from the date of the settlement in February, 1842, up to the service of the subpoena upon the defendant in this case, which was subsequent to the maturity of the note, the alleged errors had not been ascertained nor notified to him, and that on that account there is no ground for disturbing the settlement.

It is also objected that the remedy of the complainant upon the note given upon the settlement is ample and complete at law, and, therefore, this court should not interfere.

Some evidence has been offered, but I do not deem it necessary or proper at this time to express any opinion in regard to it.

The counsel in their arguments, differ essentially, not only with reference to the principles upon which the settlement was to be made, but there is a material discrepancy in the result to which they arrive, assuming the principles of the adjustment set up in the answer to be those upon which the parties agreed.

The paper marked, exhibit B., filed with the bill, is admitted to be a true copy of the settlement made on the 27th of February, 1842, for the balance appearing due by which the note of the defendant was given, and this sum he insists in his answer is the amount really due from him upon the principles of the compromise agreed upon by the parties. The plaintiff, on the other hand, contends that even assuming the defendant to be right in regard to the terms of the compromise, still the amount appearing by the settlement to be due is too small, and that, therefore, in any view of the case, there is error and mistake which a court of equity ought to correct.

Statements and calculations are submitted by the counsel on both sides, with widely different results, and as it is impossible that the Chancellor can undertake to reconcile these statements or determine which is right, there appears to be no alternative but to send the case to the proper officer of the court for an account.

In the argument of the counsel for the defendant, it is stated that after the bill in this case was filed, the note given by him upon the settlement was withdrawn, and an action at law insti-

tuted upon it, and judgment recovered, to satisfy which, the property of the defendant has been taken in execution, and it is said that these facts will be admitted by the solicitor for the complainant, and it will probably appear that the money due upon the judgment has been paid to the sheriff.

These facts do not now appear, but if deemed important an opportunity will be given by the order about to be passed, to prove them or any others, which either of the parties may consider material to the case.

THOS. S. ALEXANDER, for Complainants.

THOS. G. PRATT, for Defendants.

CHAUNCEY BROOKS ET AL	}	SEPTEMBER TERM, 1849.
VS.		
HENRY H. DENT ADM'R D. B. N. OF HENRY BRAWNER, DECEASED.		

[CHANCERY PRACTICE—DECREE TO ACCOUNT.]

A FINAL order upon a petition asking the defendant to bring money into court for the purpose of investment, cannot be passed without notice to, or hearing of, the opposite party who has answered the petition, and objected to the application.

A decree to account against an executor or administrator, either separately for the suing creditor, or specially on behalf of himself, and all other creditors is a decree for the benefit of all the creditors, and in the nature of a judgment for all.

From the date of a decree to account upon a creditor's bill against an administrator or executor, and on a due disclosure of assets, an injunction will be granted on the motion of either party to stay all proceedings of any of the creditors at law.

[This was a creditor's bill, filed on the 12th of November, 1840, against the executrix and heirs and devisees of Henry Brawner, deceased. The executrix died in July, 1847, and on the 22d of February, 1848, a bill of revivor was filed against Dent as administrator, *d. b. n.*, of Brawner, who, by his answer, admitted that he had in his hands \$5444 22, applicable to the

debts of the estate, and on the 7th of May, 1849, the complainants filed a petition asking that said Dent be directed to invest said amount under the direction of the court, owing to the complicated condition of the estate, and the variety of claims thereon, to be adjusted and settled before a distribution can be made. Upon this petition the Chancellor, on the 9th of the same month, passed an order directing said Dent to bring said sum into court, or show cause to the contrary, on or before the 19th of May following, provided, a copy of the order and petition be served on him, or his solicitor, before the 25th of April, 1849.

On the 1st of May, 1849, a decree for an account was passed in the cause, and on the 30th of the same month, Dent answered the petition of the complainants, stating various objections to the application, which it is not necessary to state in full. On the 22d of October following, the Chancellor delivered the following opinion upon this state of the case. The other opinion in this case is reported in 1 *Md. Ch. Decisions*, 523.]

THE CHANCELLOR.

The petition of the complainants, filed on the 7th of April last, praying that the defendant, Dent, might be required to bring into court, for the purpose of investment, certain moneys in his hands, was to have been heard on the 19th of the then following month of May. It was not, however, then submitted, and the court is now called upon by the complainants to pass a final order upon the petition without notice to, or hearing of, the opposite party, who has put in an answer to the petition stating objections to the application. This would be irregular, and cannot be done. It may be proper, however, to observe, that the case now is in a different position from what it was when the petition was filed, and that the decree to account passed on the 1st of May last, places it entirely in the power of the court to afford protection to the defendant against the proceedings at law, which have been or may be instituted against him by the creditors of his intestate. The rule being that a decree to account against an executor or administrator, either separately for the suing creditor, or specially on behalf

of himself and all other creditors, is a decree for the benefit of all the creditors and in the nature of a judgment for all, and from the date of such decree, and on a due disclosure of assets, an injunction will be granted on the motion of either party to stay all proceedings of any of the creditors at law. *Thompson vs. Brown*, 4 *Johns. Ch. Rep.*, 619.

From the nature of this case, the Chancellor inclines to think, it would be expedient and beneficial for all parties that the money in the hands of the administrator should be brought in for investment, and will pass an order fixing an early day for hearing the parties, if they desire to be heard, either in reference to the amount to be brought in, or the character and terms of the order, in which provision may be made for the security of the defendant against the proceedings at law of the creditors of the deceased, or upon any other question which may properly arise upon the application.

ROBERT J. BRENT, for Complainants.

CORNELIUS McLEAN, for the Defendant, Dent.

JOHN T. STODDERT AND ROBERT
BOWIE, JR. AND WIFE,

vs.

WM. H. TUCK, EXECUTOR OF
ROBERT BOWIE AND OTHERS.

} SEPTEMBER TERM, 1851.

[ANTE-NUPTIAL SETTLEMENT—PART PERFORMANCE.]

To establish, in opposition to the plea of the statute of frauds, an ante-nuptial agreement between the parents of the parties about to be married, that one was to furnish land, and the other personal property, to start the married couple in life, the proof must be clear and positive of a contract certain and concluded.

Where acts of part performance are relied on to establish such an agreement, they should be such as in themselves, not only show that there has been an agreement, but also throw light upon the nature of that agreement; if the acts performed are equivocal acts, they will afford no proof of an agreement.

[The bill in this case was filed by the complainants, John T. Stoddert and Robert Bowie, Jr., and Elizabeth, his wife, against the personal representatives, widow and devisees of Robert Bowie, deceased, for the specific performance of an alleged agreement made between the said Robert Bowie, deceased, and the complainant, John T. Stoddert, in contemplation of the marriage of their children, the other complainants. The allegations of the bill and answer, and the proof in the case are sufficiently stated in the following opinion of the *Hon. Nicholas Brewer*, Associate Judge of the third Judicial District, to whom the cause was certified by the Chancellor, who was interested in the result of the suit.]

This case has been submitted to me by certificate of his honor, the Chancellor, and has been fully argued on both sides.

The bill in substance alleges, that the complainant, Robert W. Bowie, Jr., and Elizabeth Bowie, then Elizabeth Stoddert, being engaged to be married, with consent of their parents, John T. Stoddert and Robert W. Bowie, and having no means for their support and maintenance when married, in contemplation of the said marriage, it was thereupon mutually agreed by and between their parents, and also by and between their said parents and themselves, and as a provision therefor, that the said John T. Stoddert should give to his said daughter a farm, not to exceed the value of \$12,000, and that the said Robert W. Bowie should give to his said son, as soon as he was married, \$8000 or \$10,000, in personal property, suitable for the occupation and cultivation of a farm, and in addition thereto, if the married couple should be settled near him, should furnish them with groceries and other necessary supplies for a year or more, until a crop was made to obviate the necessity of their going in debt. That on the 28th day of May, 1846, upon the faith of said agreement, and relying thereon, the said parties were married.

The bill further states, that the said John T. Stoddert, in fulfilment of *his part* of the said agreement, purchased the Nottingham farm, in Prince Georges county, at the cost (including

repairs) of \$10,550, and put the said parties in possession thereof, under the said agreement, and gave them personal property to the amount of \$1450, though he has executed no deed to the said daughter for the said farm, but being a complainant in the bill, offers to submit to a decree to that effect, insisting on a contemporaneous execution on the part of the said Robert W. Bowie, of his part of said agreement. That the said farm was purchased, not only with the concurrence but at the suggestion of the said Robert W. Bowie, made on the eve of the said marriage, and at that time the house thereon was furnished by the said Robert W. Bowie with as much furniture as he thought the said married couple would need, and the farm itself supplied to some extent with necessary utensils. That the said Robert W. Bowie had also, prior to the said marriage, and afterwards, put some slaves, &c., upon the farm, in part performance of his said agreement.

The answer of Robert W. Bowie's personal representatives, admits the marriage, but no part of the alleged agreement, and pleads the statute of frauds. It is, therefore, requisite that the agreement should be established by proof, and shown either to have been in writing, signed by the parties in pursuance of the statute of frauds, or to have been taken out of the statute by such acts as have been deemed by courts of equity sufficient for that purpose.

There is no proof of any formal agreement signed by the parties, and it was admitted by the complainants' counsel in the argument, that there was no written agreement by which the defendants' testator could be bound, unless an agreement might be inferred from the contents of three letters in the testator's hand-writing, addressed to the said John T. Stoddert, and in proof in the cause, and that a concluded agreement could be inferred from them, was not pressed upon the court.

The first inquiry is, is there any, and what, agreement proved in the cause between the parents and the couple about to be married, on the faith of which the matrimonial contract was entered into? I can find no proof whatever, of a contract between

the parents and their children, and, therefore, dismiss at once the consideration of that matter.

The first evidence relied upon to establish the contract between Stoddert and the elder Bowie, is the three letters before referred to, from the latter to the former. The first dated December 13th, 1845, informs Mr. Stoddert of the communication to the writer, by his son, of the engagement between him and Stoddert's daughter, and Stoddert's willingness to settle real estate upon her, proposes to Stoddert the purchase of the "Nottingham Farm" for that purpose, and states his own ability to give Robert some eight or ten thousand dollars in personal property, without which he considers a farm of little value. The second letter, dated 31st of December, 1845, speaks of a communication made to him by his son of Stoddert's desire for a personal conference with him on the subject of the contemplated settlement, and proposes that Stoddert should meet him in Washington, on the 9th of the then ensuing month, (January) and says, that he sees no reason to apprehend that any difficulty can arise to interrupt the early settlement of this matter. So far there is certainly no proof of a concluded agreement, but of an incipient treaty only, in which there are some suggestions of the disposition of the parties in reference to the terms of the agreement, and propositions agreed to for a personal conference on the subject. The next proof is found in the testimony of Mr. R. Johnson, who sees Robert W. Bowie in Baltimore, on his way to the proposed conference at Washington, and by whom he is told of the engagement, and of the dependence of its completion on the result of this conference. As to what passed between the parties to it we have very little information. No writing has been produced containing its result, and no direct evidence has been adduced of what was proposed or what acceded to by either of the parties. Next comes the third letter, of the 27th of May, one day before the marriage, in which the writer regrets his inability to be present at the nuptials, informs Mr. Stoddert of the completion of his purchase of the "Nottingham Farm," and says further, that "regarding your conversations in our last interview at Washington

expressing your desire to take the purchase off my hands, I have only to say, that I am quite willing to let you have it at cost. The house is very comfortably fitted up, with quite as much furniture as young beginners ought to have." In this letter, I see no evidence either of a concluded contract or of any definite terms of a contract proposed or concluded, and there is no other reference to be found in any part of the testimony to this conference at Washington.

A few days after the marriage, Mr. Bowie being at Stoddert's, in consequence of the illness of one of his daughters, and Dr. Macubbin being present attending as a physician, the latter testifies to a conversation which then took place between them. Bowie pressed Stoddert to purchase the "Nottingham Farm" for his daughter, saying that if he would do so, he himself would furnish his son Robert with personal property to the amount of ten thousand dollars, the object of the two being to start the young couple in life. He also recollects hearing Stoddert say that Bowie and himself would furnish them with a very pretty start. Bowie also said, that he would furnish his said son and wife with necessaries for the first year after their marriage, to prevent them from anticipating their crops. This is all very vague, and seems to be rather propositions and expressions of intentions at that time than references to a positive agreement entered into at an antecedent period. If any contract then, between Bowie and Stoddert is to be found in this case, we must look for the evidence of its terms solely in the admissions of Bowie in his conversations with the different witnesses. And first, Dr. Maccubbin says, that prior to the marriage, Bowie stated to him in conversation, "that Stoddert exacted as a preliminary condition to the marriage that Robert W. Bowie, Jr., should be relieved from debt, and that he, Robert W. Bowie, would place him in that condition by the payment or assumption of all his liabilities." Whether Robert W. Bowie had submitted to this exaction, and whether it constituted a part of the contract does not appear.

Thomas F. Bowie says, that Robert W. Bowie consulted him with reference to this alleged agreement, and told him, the

witness, of his, Bowie's, understanding of the agreement or marriage settlement with Stoddert, upon the intermarriage of the complainants, Robert and Elizabeth, which was, that "he had agreed with Major Stoddert, to give his said son Robert from six to ten thousand dollars, and asked witness whether he had not the option to give the lowest sum, Major Stoddert claiming the larger amount." Robert Bowie deposes that he had always understood from his uncle, Robert W. Bowie, in conversations before and after the marriage, "that he and Major Stoddert had agreed to set up their said children in life free and unincumbered, and to support them for twelve months until they made a crop; that before the marriage, various propositions were made for the purchase of farms of different values, and finally, before the marriage, Robert W. Bowie informed witness, that he had proposed to Major Stoddert the purchase of the "Nottingham Farm," and that it met Major Stoddert's views as to the value of a farm proper for them. He had repeated conversations with Robert W. Bowie after the marriage, in which he complained that Major Stoddert had not complied with his part of the contract, by deeding the property to his daughter, while he considered himself as having nearly performed his part of it. But his, Robert W. Bowie's views on that subject as to the extent of the provision he was to make were not as great after the marriage as they had been before it. Robert W. Bowie never denied that he made such contract."

Here is a contract sought to be established for a large amount, on an occasion important to the parties, of which there is no particle in writing, nor any evidence of a contract solemnly entered into by parol before witnesses, and is to be established by the loose admissions of one of the parties alone, made at different times to different witnesses, which do not agree with one another, nor possess that certainty and mutuality which should pertain to every contract. Robert W. Bowie admits before and after the marriage to Robert Bowie, or as the latter says, "never denied that he had made a contract," but when and where, and on what terms was it made? Stoddert was to furnish land, and

Bowie an equivalent in personal property. But to what amount was land to be furnished? Bowie says that he had proposed to Stoddert the purchase of the "Nottingham Farm," and that it met Stoddert's views as to the value of a farm proper for them, the married couple, not that Stoddert had agreed to purchase it and convey it to his daughter. But afterwards he complained that Stoddert had not conveyed it in compliance with his part of the contract. His, Bowie's, part of the contract with which he thinks he had in a great part complied, is not now an equivalent, but less than before the marriage, how much less we are not informed. Thomas F. Bowie is the only witness to these admissions, who speaks with certainty as to the amount of Robert W. Bowie's obligations. Robert W. Bowie tells him they were from six to ten thousand dollars, but says nothing of Stoddert's obligations. What certain contract can be inferred from admissions so varying and so imperfect as they are? Some were made before, and some after the marriage, and we have to look to both for the contract, but when we look to the testimony of Dr. Maccubbin as to the conversation between Bowie and Stoddert just after the marriage, we find that nothing was then settled. Bowie urged the purchase of the "Nottingham Farm," by Stoddert, and promised to give \$10,000 in personal property, if Stoddert would purchase that farm for his daughter. Stoddert afterwards purchased the "Nottingham Estate," but was careful not to convey it to his daughter. Bowie took away and sold part of the property that was put upon the "Nottingham Farm," and we do not hear of anything further passing between the parties on that subject.

On the whole, the evidence is conclusive to my mind, that Stoddert and Bowie were both desirous of providing for the newly married couple, intending to do so, and were in treaty as to the amounts to be respectively contributed, but never came to any definite and conclusive arrangement. That though he used the term contract, Robert W. Bowie's admission evidently referred to those propositions and negotiations in which the views and intentions of the parties were spoken of, and which he no doubt thought at that time ought to be carried out, and

Stoddert, by the purchase of the farm, placed himself in a situation to comply with the agreement when it should be completed, but there is no proof that he ever incurred the obligation to convey it to his daughter.

Being of opinion that no certain contract is established in this case, it is unnecessary to examine very critically the point that there is no part performance to take the case out of the Statute of Frauds. I will, however, make a very few remarks upon it. It is laid down in the books that the act performed should in itself tend to show not only that there has been an agreement, but also to throw light on the nature of that agreement, so that neither the fact of an agreement, or even the nature of that agreement, rests solely upon parol evidence, the parol evidence being only auxiliary to the internal evidence afforded by the circumstances of the case itself. If, however, the act performed is an equivocal act, it will afford no proof of an agreement. *Atherly on Marriage Settlements*, 89. Suppose, then, that the contract alleged had been proved to have been entered into some short time preceding the marriage, what are the facts relied on as part performance on the part of Robert W. Bowie? It is said that the house was furnished, and stock put upon the farm to work it, and the parties put in possession of the farm, stock and furniture. Laying aside the admissions of Robert W. Bowie, that these acts were in part performance of his contract, because that must be shown by the nature of the acts themselves, are they unequivocal? Might they not, and would they not, have been done in all probability if no marriage contract had existed? His son being about to be married, and having no residence of his own, his father furnishes a house on one of his farms near his residence, puts some more stock on it, and permits him to live there, work it, and receive the proceeds of his labor, he, the father, being or supposing himself to be a wealthy man. This would naturally have been done if there had been no agreement, or only a treaty for an agreement. The supposed agreement was, that Stoddert should furnish the land, and he would furnish the stock to work it. Stoddert had as yet furnished no land. He put the parties in

possession of none. He was in treaty for this land, but did not purchase it until some months afterwards. If the land had been Stoddert's, and he had put the married couple in possession of it, then the act of putting personal property upon it might have been considered in part performance. If he had declined the purchase, and had bought other land, and put them in possession, and Bowie had then put the property on it, it might have been so considered, because the act could not well have been referrible to any other intention. But the married couple are enforcing this agreement against both parents. Stoddert does not resist, but it must be shown to bind Bowie, that he, Stoddert, was bound as well, and to show this, part performance must be proved against him. And what was this part performance? Merely permitting the occupant to remain there for little more than a year before the death of Bowie, Bowie taking and selling as his own the property put upon the land, and Stoddert taking the deed to himself instead of his daughter. It seems to me very clear that there was no part performance by either of the contracting parties. The case of *Dugan and others vs. Gittings and others*, 3 Gill & Johns., 157, is not a parallel case to this. There the gift was made to the daughter about to be married. The consummation of the marriage was considered the fulfilment of the condition which it was to attach, and was considered as equivalent to the payment of the purchase money in a pecuniary contract. The pecuniary contract was fully performed by the one party, and partly performed by the other.

Entertaining this opinion, I must dismiss the bill.

[An appeal was taken from the decree dismissing the bill, and this decree was affirmed by the Court of Appeals, at its December term, 1853.]

R. JOHNSON and J. M. CAMPBELL, for Complainants.

THOS. G. PRATT and THOS. S. ALEXANDER, for Defendants.

ISAAC MAYO, EXC'R OF
THEODORICK BLAND

vs.

SARAH BLAND.

DECEMBER TERM, 1851.

[CONSTRUCTION OF WILLS—LEGACIES—LEGATEE—LEGACIES TO A WIDOW—CHANCERY PRACTICE—COMMISSIONS TO EXECUTORS.]

A DEVISE of "all my property real and personal of every description," except certain specified portions, "unto my wife during her natural life" is a general and not a specific bequest.

A devise of "my Bland Air estate, with all the slaves and their increase, which I derived in a course of distribution from my uncle T. F., deceased, and all the personal property thereon, not slaves, and used with the same at the time of my death unto my daughter during her natural life," is a specific bequest.

A bequest of "all my books, historical or biographical, of Greece, of Rome, of Great Britain or Ireland, of the United States, and of the several states, and Rees' Encyclopedia to my son-in-law as a token of my respect for him," is a specific legacy.

A bequest of "all the rest of my books with my household furniture to be preserved by my wife for her own use during her life, as hereinbefore mentioned, or to be sold or given to our children or grand children in such manner and proportions as she may think proper," is a general legacy.

To constitute a bequest of personal estate specific, there must be a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of the separated portion to the legatee.

In case of a deficiency of assets to pay debts, general legacies must be exhausted before the specific legacies can be resorted to for contribution, and this rule prevails though the general legatee be the widow of the testator, where the provisions made for her by the will exceed her common law rights, at least so far as the excess is concerned.

If the provision made for the widow, who abides by the will, does not exceed her common law rights, a general legacy to her will not abate to pay debts in favor of specific legatees, she being considered a purchaser with a fair consideration.

A widow cannot renounce the will as to personalty, and claim the benefit of it as to the realty; she must either renounce the whole or be barred as to both the realty and personalty.

An averment in a bill, "that the property bequeathed to the widow is liable to to pay debts" is a sufficient averment, that the benefits taken by her under the will are greater than her legal rights, because such liability depends upon this fact.

The devise of "my Bland Air estate, and all the slaves and personal property thereon, not slaves, and used with the same," passes the crops and produce on the farm, at the time of the testator's death, and also the furniture in the dwelling house standing upon the farm, and used by those occupying it.

Commissions to an executor will not be distributed so as to be thrown upon the separate portions of the personal estate, in order to make the several legatees, general and specific, bear their proportions thereof; such a distribution would be introducing an entirely new principle in our testamentary system.

[The clause of the will of the late Chancellor Bland, which came under review in this case, are as follows :

1st. "I do hereby give and devise all my property, real and personal, of every description, except Bland Air, and the slaves, with their increase, which I derived in a course of distribution from my uncle, Thomas Fitzhugh, deceased, and the other personal property thereon, not slaves, and used with the same at the time of my death, and except the bequests hereinafter mentioned, unto my wife during her natural life, confiding to her the care and maintenance of our son, should he so live long.

2d. "I do hereby give and devise my Bland Air estate, with all the slaves and their increase, which I derived in a course of distribution from my uncle, Thomas Fitzhugh, deceased, and all the personal property thereon not slaves, and used with the same at the time of my death, unto my daughter during her natural life, and after her death as hereinafter provided, she or the persons taking after or under her paying therefor to her mother during her natural life, annually, to be computed from the day of my death the sum of three hundred dollars, by way of a rent charge.

3d. By this item, the testator charged all his estate, "real and personal, including the beforementioned Bland Air estate and property, without exception, whosoever may be the holder of the same," with the payment of an annuity to his son of six hundred dollars per annum from the day of his mother's death.

5th. "I do hereby give and bequeath unto Captain Isaac Mayo, the husband of my daughter, all my books, historical or biographical, of Greece, of Rome, of Great Britain or Ireland, of the United States, and of the several states, and Rees' Encyclopedia, as a token of my respect for him. The copy of my reports of cases in Chancery in my use at the time of my death, and in which I have made many additional references in pencil, I wish to be preserved and given to one of my grandchildren by their

parents or the survivor of them. All the rest of my books, with my household furniture, to be preserved by my wife for her own use during her life, as hereinbefore mentioned, or to be sold or given to our children or grandchildren in such manner and proportions as she may think proper. All my manuscripts concerning law or any other subject to be burnt as being of no value, and utterly unfit for publication."

The other facts of the case are fully stated in the following opinion of the Chancellor.]

THE CHANCELLOR :

Upon carefully reading the will of the late Chancellor Bland, and examining the authorities applicable to the subject, I am of opinion that the bequest to his wife in the first clause, is general and not specific, and the authorities are, in my judgment, equally clear to show that the bequest to his daughter in the second clause is specific.

The cases which are collected and reviewed by *Mr. Roper* in his treatise on the law of *Legacies*, at page 184, *et seq.* of the first volume, seems to me to be quite conclusive upon the subject. There may, perhaps, be more difficulty in determining the character of the bequest to the testator's wife in the 5th clause. In that, after giving to Captain Isaac Mayo, the husband of his daughter, "all his books, historical or biographical, of Greece, of Rome, of Great Britain or Ireland, of the United States, and of the several states, and Rees' Encyclopedia, as a token of his respect," he directed all the rest of his books, with his household furniture, to be preserved by his wife for her own use during her life, as thereinbefore mentioned, or to be sold or given to their children or grandchildren in such manner and proportions as his wife should think proper.

It has been strongly urged by the counsel for Mrs. Bland, that with regard to these books and household furniture, she must be considered as a specific legatee, but I do not think he is sustained by the authorities, or the principle upon which the distinction between general and specific legacies is founded. The bequest of all the testator's personal estate is certainly not

specific, and I cannot well understand how the bequest of all that remains after taking out a particular or designated portion, can be so considered. In order to constitute a bequest of personal estate specific, there must be a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of a specified portion to the legatee. The cases cited in 1 *Roper*, 185, prove this, as do those referred to in 2 *Williams on Executors*, 747, 748. See also the cases collected in the notes to the case of *Kirby vs. Potter*, 4 *Ves.*, 748.

The bequest, however, of the books to Captain Mayo, is specific, because they are described with sufficient certainty to enable the legatee to call upon the executor to deliver them over to him in specie.

I am, therefore, of opinion, that in case of a deficiency of assets to pay the debts of the testator, the legacies to the testator's daughter and Captain Mayo would not be liable to abate, with the general legacy to the widow, which must be exhausted before the specific legatees can be resorted to for contribution.

The will was executed in May, 1845, at which time the testator owned certain real estate in the state of Virginia, which he authorized and directed his executors to sell, the proceeds to be applied to the payment of his debts in exoneration of his real and personal estate in this state, and the surplus to be invested as therein directed, and to be held and enjoyed by his wife during her natural life.

Prior, however, to the death of the testator, in November, 1846, he himself made sale of his real estate in Virginia, and some of the bonds taken for the purchase money remained unpaid at that time, which came to the hands of his executor, Captain Isaac Mayo, the other executor, the widow, having renounced the trust.

It is very apparent, that at the date of the will the testator considered that his Virginia property would produce money enough to pay his debts and leave a surplus, and as after he made sale of the property he made no further provision for the payment of his debts, we may, perhaps, reasonably infer that he continued under the impression that the money which his

executor would realize from the unpaid bonds would be ample for the purpose. At all events, no change was made in his will, and the Virginia property alone was appropriated by the testator for the payment of his debts.

Mrs. Bland having renounced the trust, and letters testamentary having been granted to Captain Mayo, and after some progress had been made in the settlement of the estate, an agreement was made between these parties, dated on the 4th of March, 1847, by which it was stipulated that the money on hand at the time of the death of the deceased, or since received, together with the carriage and horses, and library, which were bequeathed to Mrs. Bland for life, by the general terms of the will, should be sold by the executor for the purpose of paying off debts, or for other purposes, at the discretion of the executor, the agreement reciting that a similar arrangement might be made as to the other parts of the estate of said deceased, which were in like manner devised, the arrangement being intended to relieve other portions of the estate from the pressure of debts, until a certain fund in the estate of Virginia could be received. And it was further agreed that Isaac Mayo should pay to Mrs. Bland interest on the said sum of money every six months during her life, and be substituted as executor to all right in the said fund in Virginia, so far as the amount of said sales shall go towards making up said sum. And there was a further stipulation that if the Virginia fund should exceed the amount of debts, Mayo was to pay Mrs. Bland interest in like manner on the excess.

It can scarcely be doubted, that when this agreement was made the parties both supposed the Virginia fund would be sufficient to pay the debts of the deceased, who had then been dead about four months, and consequently the executor could not have known the actual situation of the estate.

Subsequently to this agreement, but the precise time does not appear, Messrs. Randall and McLean, the persons mentioned in said paper, who were to ascertain the amount for which interest should be paid, and how, and in what manner it should be secured, made a statement, according to which, the sum upon

which Captain Mayo was to pay interest was ascertained to be \$2702 10, and the half yearly interest, being \$81 06, he was to pay on the 16th of May and November, of each year, so long as Mrs. Bland should live.

By this statement it appeared that the books in which Mrs. Bland had a life-estate, produced \$1270. The cash on hand, and arrears of salary due deceased amounted to \$851 50, and that the carriage and horses produced \$600, amounting in all to \$2722 10, from which there was deducted a fee of \$20, leaving a sum of \$2702 10, as the amount upon which interest was to be paid.

I do not think that by any fair construction of this agreement it can be maintained that Captain Mayo intended to run the risk of the inadequacy of the Virginia fund, to pay the debts of the deceased. He could not then, on the 4th of March, 1847, have known the actual condition of the estate, and it would require very plain language to induce any court to believe that under these circumstances he designed assuming upon himself the whole risk of a deficiency.

Of the sum upon which he agreed to pay interest during the life of Mrs. Bland, eight hundred and fifty-one dollars, being nearly one-third of the whole amount, consisted of cash and arrears of salary, in regard to which no possible doubt could be entertained that it was responsible for the payments of debts, there being no pretence that the bequest of it was specific, whatever may be thought of the bequest of the books and other articles of personal property sold. The plain sense of the agreement is, that the property bequeathed Mrs. Bland should be sold and applied in anticipation of the receipt of the funds expected from Virginia, and as it was supposed those funds would be sufficient to pay the claims of creditors, it was agreed that the executor should pay Mrs. Bland interest upon so much of her money as was taken to pay creditors, and be himself reimbursed out of the Virginia fund when received. If Mayo intended in any event to assume to pay Mrs. Bland interest on the amount of sales, &c., and incur the risk of the sufficiency of the Virginia fund, why was it stipulated that he should be substituted as

executor to all right, so far as the sales should be applied in lieu of and in anticipation of that fund. As executor, he, of course, was entitled to receive the fund, and there could have been no necessity for substituting him for that purpose, and the only object of the agreement was to enable him, after paying the debts of the deceased out of the property and money which were thereby made applicable to that purpose, to reimburse himself. That is, if the Virginia fund had been collected and with it the debts of the testator paid, Mrs. Bland would have been entitled for life to the property and money bequeathed to her, and if Mayo had sold that property and taken that money in trust for the parties entitled in remainder, he must have paid Mrs. Bland interest on the amount for life. But as her property and the money were taken, it was the design of the agreement to that extent that Mayo should hold the Virginia fund in lieu of it, and pay her interest upon it for life.

It was, however, subsequently discovered, that the Virginia fund was not sufficient to pay the debts of the testator, and consequently, according to the opinion I have formed of the character of the bequest to Mrs. Bland, the property embraced in that bequest, was liable to supply the deficiency. Certainly, so far as the cash on hand and salary are concerned there can be no difference of opinion on the subject, for no one can say the bequest so far as those items are concerned is specific.

When this discovery was made does not appear, but it does appear that some time after the statement, No. 4, was made, Captain Mayo refused to pay the semi-annual interest, and refused and instructed his counsel to refuse to give the judgment by which the payment was to be secured.

In this state of things, and after some negotiation between the counsel of the parties, it was agreed that a case should be docketed, by consent, and judgment confessed, subject to an agreement filed in Anne Arundel County Court, on the 25th of October, 1849, whereby it was stipulated that the damage should be relieved on payment semi-annually of the interest on the sum mentioned in the statement before referred to. But it was also expressly agreed, "that the judgment was rendered in settlement

of the agreement of the 4th of March, 1847, and that the confession of the judgment should not preclude any defence the said Mayo might have in equity, (if any he had,) and that the question might be presented as the said Mayo may be advised, to the Chancellor, on proper proceedings for that purpose, whether the surplus of the debts over the fund provided by the testator specially, for the payment ought to fall upon Mrs. Bland, or the property held by her under the will of Theodorick Bland, deceased, or otherwise and in what proportions." And in order that all questions reserved might be properly decided, it was understood, that said Mayo should file his bill, &c.

I do not understand that it is very strenuously urged that Captain Mayo has forfeited his right to have these questions examined and decided in this court, by reason of the judgment confessed by him in pursuance of the above agreement, and certainly I can see no possible ground upon which it could be so insisted. There can be no doubt, I think, that whilst Mayo was willing to give the judgment, he meant to do so with a reservation of his right to litigate these questions, and that the plaintiff in the judgment was willing to take it upon these terms, and this mutual understanding of the parties is expressed in language altogether free from ambiguity.

It remains then to be considered whether the bequests to Mrs. Bland, though general, and though the property to which they apply would undeniably be liable to the claims of creditors before specific legacies could be resorted to, shall be protected to the prejudice of the specific legatees, in consequence of the relation she bore to the testator. In other words, whether the rule of law relative to general and specific legacies shall be reversed when the general legatee is the widow of the testator.

The ground upon which this preference is claimed for the widow is, that by the act of 1798, ch. 101, sub ch. 13, it is declared, that a widow accepting or abiding by a devise in lieu of her legal right, shall be considered as a purchaser with a fair consideration. Such is the provision in the act referred to, and it may be that if the devise or bequest to the widow, or the benefits she takes under the will do not exceed her common law

rights, the principle contended for would be a sound one. But if the provisions made for her by the will do exceed her common law rights, I cannot conceive upon what just principle the position can be maintained, so far at least as the excess is concerned. It appears to me quite clear, that there is nothing in the language of the Court of Appeals in *Gibson vs. McCormick*, 10 *Gill & Johns.*, 111, 112, upon which the rights of widows can be carried to the extent now contended for. In this case, Mrs. Bland, by the will of her husband, receives and enjoys during her life the whole income of his real estate, and of the personal estate she is in the possession and enjoyment of, all which was in the city of Annapolis, except the books, the cash on hand and salary, and the carriage and horses.

There can be no doubt, therefore, that by standing by the will, Mrs. Bland's condition is much better than if she had renounced. The legislature, by the act referred to, does not give to widows, when real and personal estates are devised to them, the privilege of renouncing as to one and abiding by the will as to the other. They must renounce the whole, or be barred as to both the realty and personalty. It was not, therefore, at the option of Mrs. Bland to renounce her husband's will so far as the bequest of the personal estate was concerned, and claim the benefit of it with respect to the realty, and, therefore, I cannot well understand what equity she has to insist that a plain principle of law shall be reversed in her case, when, without such reversal and subjecting the devises and bequests of this will to the general rule of law, she still is a great gainer by standing by its provisions.

There is, moreover, another provision in this will which displays with great force the injustice that would be done by adopting the principle insisted upon by the defendant. Upon the death of Mrs. Bland, the testator directs that an annuity of six hundred dollars shall be paid his son, by his daughter, Mrs. Mayo, to whom the "Bland Air" farm and the personal property thereon were given, and he charges said estate, and the property thereon, with the payment of said annuity. Now the proceedings show, that if the personal property bequeathed generally to

Mrs. Bland is not liable for the payment of debts, that or the "Bland Air" farm must be so applied, and thus the property on which and in respect of which the charge of the annuity of \$600 was imposed, would be diminished whilst the charge itself would remain in full force.

Upon the whole, then, and in view of all the circumstances of this case, I am of opinion, that the property bequeathed generally to Mrs. Bland, was liable for the payment of the debts of the testator, and the expense of the administration of his estate before the specific bequests could be resorted to, and that there is nothing in the agreements and acts of the parties which precludes the executor from raising the question in this cause. And I am also of opinion, that the technical objection to the frame of the bill cannot be maintained. The bill alleges that the cash on hand and moneys due the deceased, and proceeds of the personal property, so as aforesaid, sold by the executor, with the consent of Mrs. Bland, were applicable to the payment of debts, and prays that the same may be so applied, and that the judgment against the complainant rendered in pursuance of the agreement before referred to, shall be so corrected and reduced as to require him to pay interest only on the sum actually due from him, after applying said cash and proceeds and the money received from the Virginia fund to the payment of the debts of the testator; and for this purpose that an account may be taken in this court. There is, to be sure, no express allegation in the bill that the devises and bequests to Mrs. Bland exceed the value of her common law rights. But when the bill avers, as it does, that the property so bequeathed and money is liable to pay debts, if that liability depends upon the fact that the benefits taken by Mrs. Bland under the will are greater than her legal rights, the fact itself must be regarded as substantially averred.

The case of *McCormick vs. Gibson* is not an authority to prove that this question may not be presented without an explicit averment in the bill, of the excess of the provision over the common law rights of the widow. The court, in that case, held the widow to be entitled to the provision made for her by

the will, because there was neither allegation *or proof* that the provision was larger than she would otherwise have been entitled to.

The defendant, by her answer in this case, and her counsel in the argument, has raised several questions upon the accounts passed by the executor in the Orphans Court. Among other objections to these accounts, it has been said that the crops and some articles of personal property on "Bland Air" did not pass by the devise to Mrs. Mayo in the second clause of the will. In construing this devise, we must of course, as in every case of the kind, ascertain, if we can, the intention of the testator, and my strong conviction is, that he did intend to give his daughter the crops and property in question. I do not think it can be fairly inferred, that he intended to give her his slaves and farm stock, and withhold from her the crops and produce of the farm essential to their support, and raised on the farm to which they belonged. Neither can I persuade myself to think that when he gave her the "Bland Air estate," and all the personal property thereon, and used with the same, that he meant to deny her the furniture in the dwelling house, which stood upon the farm and was part of the estate, and which was used by those occupying it. Although the furniture in the house may not have been used with the farm, that is, in cultivating the land, it was used with the estate, the house being of course part of the estate and the furniture being used with the house.

With regard to the objection that the commissions of the executor should have been so distributed as to be thrown upon the separate portions of the personal estate, and thus make the several legatees general and specific bear their proportions thereof, I am of opinion it cannot be maintained. It would be introducing an entirely new principle in our testamentary system, for which no authority has been, nor, as far as I am informed, can be produced.

There are other matters connected with the accounts which I shall reserve until the coming in of the report of the Auditor, to whom I shall send the cause, with instructions to state an account according to the views herein expressed, from the plead-

ings and proofs now in the cause, and such further proofs, if any, as the parties may lay before him.

A. RANDALL, for Complainant.

DANIEL M. THOMAS, for Defendant.

HENRY WAYMAN AND LARKIN SHIPLEY, }
 VS.
 RICHARD G. STOCKETT. }

JULY TERM, 1847.

[LIABILITY OF TRUSTEES—CHANCERY PRACTICE.]

A TRUSTEE for the investment of certain trust funds, for the benefit of certain *cestui que trusts*, paid a portion of the trust money into the Court of Chancery under its sanction, which remained there for some time uninvested. HELD—that he was not responsible for interest on the sums so paid into court for the time during which they remained uninvested.

Upon petition of a *cestui que trust*, the Chancellor passed an order directing certain mortgages belonging to the trust estate to “be forthwith closed,” and that the *cestui que trust* “have leave to cause a suit or suits to be instituted for that purpose, in the names of the trustees, in such manner as may be most proper, necessary and beneficial to him.” HELD—

That under this order, the *cestui que trust* might file a bill to foreclose a mortgage executed by one of the trustees to the trust estate, and was not confined to a proceeding by way of petition in the original cause.

[By the will of Larkin Shipley, executed in 1822, the testator devised the residue of his estate, real and personal, to Richard G. Stockett and Henry Wayman, in trust for his nephew, Larkin Shipley, for and during the term of his natural life, and if he should die without issue of his body lawfully begotten, then the property to be equally divided among his brothers and sisters, but if he should have lawful issue of his body at the time of his death, then to such issue share and share alike. The testator then directed the said trustees “to retain the sole possession and custody of the said estate, for the purpose of educating his said nephew, and to rent out the real estate, and put out the money on interest to the best advantage, and pay away the yearly proceeds, after his arrival at age, to him, but to retain a

control over the principal till the objects of this bequest and devise are fully complied with."

The will also contained a legacy of \$7,000 in favor of the testator's niece, Anne Shipley, the annual interest whereof was to be paid to her during her natural life, the principal after her death to be divided among her children, but if she should die without leaving lawful issue then over, the said trustees to retain in their hands the principal, and put the same out at interest or good security for the purposes aforesaid. The said trustees were also appointed executors of the will.

Various proceedings in equity arose under this will, which are particularly reported in the case of Jones, who married the legatee, Ann Shipley, against Stockett, 2 *Bland*, 409 to 436, and the *Farmers and Mechanics Bank* vs. *Wayman and Stockett*, 5 *Gill*, 336 to 358. By these proceedings, among other things a debt due by Stockett to the testator, Larkin Shipley, and secured by a mortgage to him, executed by Stockett in 1821, was decided to constitute a part of the trust fund, to be held by Wayman and Stockett for the benefit of the testator's nephew, Larkin Shipley, one of the complainants in this case.

On the 8th of July, 1847, the Auditor, at the request of Stockett, made a report and statement of said mortgage debt. By this statement, the Auditor says it appears that there has been paid, over and above the interest on said debt, the sum of \$875 72, of which there was paid into court on the 1st of March, 1845, \$388 23, on the 21st of January, 1846, \$24 14, and on the 20th of May, 1846, \$422 27, the residue having been paid in small amounts at different times. These sums were paid into court without the consent of the *cestui que trust*, but with the approbation of the court, and it is submitted whether the said Stockett, being one of the joint trustees, whose duty it was to make an immediate investment, is not answerable for interest upon the same from the time they were severally deposited in court until they shall have been invested. That there is still due on the mortgage the sum of \$981 67.

Previous to this statement and report of the Auditor, to wit, on the 29th of July, 1846, the Chancellor (*Bland*) had, upon

the petition of the complainant, Shipley, for that purpose, passed the following order :

“The petition of Larkin Shipley, filed on the 10th instant, standing for hearing on this day, and no cause having been shown to the contrary, according to the order passed on the said 10th instant, it is ordered that the said mortgages in the said petition mentioned, be forthwith closed, and that the said Larkin Shipley have leave to cause a suit or suits to be instituted for that purpose in the names of the said trustees, in such manner as may be most proper, necessary, and beneficial to him, and it is further ordered, that the said trustees proceed forthwith to invest the moneys now in court, so far as the same may be principal, in the public stock of the corporation of the city of Baltimore, the said stock to stand in their names, as trustees, but in such a manner that the said Larkin Shipley may, during his life, receive the interest or dividends thereon directly from the proper officer of the said corporation, without his having in any manner the control of the said stock, provided it can be so entered on the books of the said corporation, and if the entry cannot be so made, the said trustees are hereby directed to leave with the proper officer a general authority for the said Larkin to receive the said dividends or interest during his life, and the said trustees shall bring into this court the certificates of the said stock, there to remain until further order.”

An original bill was then filed by Shipley and Wayman against Stockett, for the foreclosure of the mortgage executed by him to the testator, Larkin Shipley, deceased. Previous, however, to action on this bill, the Chancellor, (*Johnson*), on the 27th of July, 1847, delivered the following opinion upon exceptions filed by Stockett to the Auditor's report, of the 8th of July, 1847.]

THE CHANCELLOR :

In this case, exceptions having been filed to the report of the Auditor of the 8th of July last, by Richard G. Stockett, and the same having been argued by the counsel of the parties, they have received due consideration from the Chancellor. Those

exceptions raise the question of the liability of the said Stockett for interest on the several sums paid by him into court, under its sanction, whilst they have remained uninvested.

Looking to the decision of the late Chancellor, in *Jones vs. Stockett*, 2 *Bland*, 424, 425, and to the circumstances under which the payments were made, I do not think that Richard G. Stockett should be charged with interest as suggested by the Auditor.

It is understood that no decision is expected at this time in regard to the credit claimed by Stockett for payments on account of fees and taxes.

A question was also presented, and the opinion of the court asked, with respect to the costs which may have accrued upon the proceedings instituted by Larkin Shipley, under the order of the 29th of July, 1846. It is my opinion, that inasmuch as these proceedings were expressly authorized by the said order, the party for whose benefit they were instituted will, if they prove successful, be entitled to his costs, as is usual in other cases. The opinion of the court upon the last question is expressed only because the solicitors on both sides asked for it.

[With reference to the bill for the foreclosure of the mortgage, the Chancellor, on the 30th of July, 1847, delivered the following opinion.]

THE CHANCELLOR :

This bill is filed for the sale of certain premises which had been mortgaged by the defendant to Larkin Shipley, on or about the 18th of September, 1821, for the purpose of securing the payment of a sum of money therein mentioned.

This debt, by certain proceedings in the Court of Chancery, described in the bill, became and was constituted a part of the trust fund, to be held by Wayman, one of the present plaintiffs, and the defendant, Stockett, in trust for the complainant, Shipley, for life, with remainder to the persons mentioned in the proceedings. It appears by the Auditor's report of the 8th of July, 1847, that divers sums for interest and principal have

been paid by Stockett on account of this debt, reducing it as of the date of the said report to \$981 67. It also appears by an order of the late Chancellor, passed on the 29th of July, 1846, upon the petition of the complainant, Shipley, praying that proceedings might be instituted for the foreclosure of this mortgage, amongst others that authority was given for that purpose. The language of the order is, "that the said mortgages in the said petition mentioned, be forthwith closed, and that the said Larkin Shipley have leave to cause a suit or suits to be instituted for that purpose in the names of the trustees, in such manner as may be most proper, necessary and beneficial to him."

The bill was filed under this order, but the answer of Stockett insists that the proceeding against him should have been by petition in the original cause, and not by bill for foreclosure and sale of the mortgaged premises. This objection, I think, is answered by the order of July, 1846, which expressly authorizes the party to proceed by suit, or suits, as may be most beneficial to him. I cannot think the Chancellor intended to confine the plaintiff to a proceeding by way of petition in the original cause.

In an account marked H., filed on the 22d of January, 1838, and ratified on the 24th of the same month, the defendant, Stockett, was allowed a commission of six per cent. on the amount accounted for by him. There is not, in my opinion, any thing in his conduct since then, which should deprive him of a commission at the same rate on the payments made by him since.

The proceedings in the original cause of Jones and wife against Wayman and Stockett, being, by agreement of counsel, referred to as evidence in this cause, it is thought the sum now due on the mortgage of Stockett may be readily ascertained by correcting his accounts filed on the 12th of this month, by crediting him with commissions on the payments made by him since the former account. Upon ascertaining the precise amount due from him, the Chancellor will pass a decree for the sale of the mortgaged premises, unless the said Stockett shall pay the sum so due, with interest and costs, within nine months from the

date of the decree. The Chancellor thinks, the defendant under all the circumstances, was warranted in supposing the fund in his hands would not be abruptly withdrawn from him, and it is for this reason that he is disposed to give him a reasonable time to pay the debt.

[The trustees having invested a part of the trust fund as directed, brought the certificates of stock into court, and upon the suggesting of counsel as to their safe keeping, the Chancellor, on the 4th of August, 1847, passed the following order.]

THE CHANCELLOR:

It having been suggested in this case, that the security of parties requires that some place of safety be provided for the custody of moneyed securities invested under the orders of the Court of Chancery, or placed under its control, and the Chancellor concurring in the propriety of this suggestion; it is, thereupon, ordered, that all such securities be placed by the Register in the Farmers Bank of Maryland, and that for that purpose, he procure a trunk, or box, properly labelled, in which such securities shall be put, and then deposited as aforesaid, in the said bank. And that the register shall so designate and mark the several and respective securities, by endorsement on the envelopes, or otherwise, as to show the cases to which they belong.

McLEAN, for Complainants.

ALEXANDER, for Defendant.

HENRY WAYMAN AND
RICH'D G. STOCKETT
vs.
ANNE JONES AND OTHERS.

} MARCH TERM, 1850.

[DUTIES AND LIABILITIES OF TRUSTEES—EVIDENCE—CHANCERY PRACTICE.]

If any portion of the trust fund has been misapplied or destroyed, it is the duty of the trustee to communicate the fact to the court, and ask its sanction of the measures adopted by him to obtain redress.

The president and cashier are competent witnesses for the bank, to prove at what time a trustee had knowledge of the transfer of certain stock, part of his trust fund, standing on the books of the bank.

If a trustee acting on his own responsibility, receives any property from the party misapplying the trust fund, either in payment or as security for the payment of the amount due the fund, he must put the transaction in such a position that its character may be easily understood, and any bad consequences flowing from the obscurity of the transaction, must fall upon him.

Though a portion of the trust fund is entrusted to the supervision and control of one of two trustees, yet if any fact endangering its safety comes to the knowledge of the other trustee, he is bound to see to its security and communicate the fact to the court and his co-trustee.

If a trustee acting upon his own discretion, makes an investment of trust funds without the sanction and approbation of the court, he will be responsible for any losses thereby incurred.

An order passed by the court upon petition, of one of the *cestui que trusts*, directing the trustee to account for a portion of the trust fund, and specifying to some extent the responsibility incurred by him, does not finally determine any right and is not conclusive on any of the parties to the case.

An order confirming an Auditor's report, is an order in the nature of a final decree.

[The facts in this cause will be found set out at length in the case of *Jones and wife vs. Stockett*, 2 *Bland*, 409 to 436, and in the case of the *Farmers and Mechanics Bank et al vs. Wayman and Stockett*, 5 *Gill*, 336 to 358. It is the proceedings in Chancery which occurred after the cause was remanded by the decree of the Court of Appeals, in 5 *Gill*, 358, that are now to be reported. The following brief synopsis of facts taken from these cases will suffice for an understanding of the opinions here reported.

Wayman and Stockett were appointed trustees by the will of Larkin Shipley, deceased, executed in 1821, to invest a legacy of \$7000, given by said will to the testator's niece, Anne Shipley, who subsequently married Samuel Jones, by whom she had several children. By the terms of the bequest the trustees were to put the principal of the legacy out at interest on good security, and pay the annual interest thereof to the said Anne during her natural life, and if she should die leaving lawful issue, then to divide the principal equally among her children. The trustees, by the order and sanction of the Chancellor, on the 20th of April, 1826, invested \$3552 of this

trust fund in the purchase of 222 shares of the capital stock of the Bank of Westminster. This stock was transferred on the books of said bank to Wayman and Stockett, *as trustees* under said will, for the benefit of Anne Jones, wife of Samuel Jones. This bank, by virtue of the acts of Assembly, explained and stated in 5 *Gill*, 356, *et seq.*, was afterwards divided into two branches, and its name and location changed, the mother bank under the name of The Farmers and Mechanics Bank of Frederick, being located at Frederick, and the branch continuing at Westminster, under the name of the Bank of Westminster. By this change, and through default of the banks, the stock in question, in 1829, stood upon the books of the mother bank at Frederick in the name of "*Anne Jones, wife of Samuel Jones,*" and on the 14th of June, 1830, the whole of it was transferred by said Jones and wife to various purchasers.

Wayman, one of the trustees, had notice of this illegal transfer a short time after it was made, and instead of bringing the matter to the notice of the court, proceeded to obtain reimbursement therefor, by receiving transfers of stock, &c., from Jones, and after his decease in 1831, from his wife, as his administratrix, in the manner described in the opinions here reported, and it is chiefly as to his liability in the premises that the questions decided in these opinions have reference. They were delivered by the *Hon. Nicholas Brewer*, Associate Judge of the third judicial district, to whom the cause was certified by the Chancellor, (he having been of counsel in the cause,) upon exceptions to the reports and accounts of the Auditor. These exceptions are numerous and lengthy, but need not be stated, as the substance of the most important of them sufficiently appears from the opinions themselves.]

OPINION BY JUDGE BREWER :

The Court of Appeals, in this case, have determined that the Farmers and Mechanics Bank of Frederick and the Bank of Westminster, are eventually liable to the *cestui que trusts* for the amount of the stock transferred by Jones and wife by

their permission, but that the administratrix of Jones is first liable to the amount of the assets in her hands, and Wayman also and before her, to the amount of any sums received in payment, or of any stocks or other property transferred as securities, which had been lost by his default; but the court was prevented from coming to any conclusion on the whole case in consequence of the imperfect and unsatisfactory nature of the testimony as to the character of the transfers made by Mrs. Jones to Wayman, and to the question whether the loss of the property so transferred was attributable to any act of his, for which he could be held accountable. No further testimony having been taken as to these points, this court is compelled to decide, as the Court of Appeals might have done, upon the testimony as it stands, however imperfect it may be.

The obscurity of the transaction, and consequent difficulty in the cause, arises, in a great measure, if not entirely, from the conduct of Wayman in undertaking to obtain redress for this illegal transfer, without communicating the fact to the court or asking its sanction of the measures adopted by him, both of which it was his duty to have done, and the omission of which if not inexplicable, is certainly difficult to explain. It must have arisen either from collusion with Jones in the transfer, probably from motives of kindness to him, or from a subsequent unwillingness to expose the transaction, which, from the testimony of Hardesty, he seems to have considered very culpable.

Wayman states, both in his answer to the bill of Jones and wife, and in the bill of Stockett and himself against them, that he was ignorant of the transfer until a short time before, but it is clearly proved by Beall and Morgan that he knew of it a few days after the transfer. Exceptions were filed to their testimony on the 14th of March of the present year, but they certainly come too late after the case has been to the Court of Appeals and their decision based upon that testimony; but if not too late, they do not appear to be sound. The object of the bank was not to prove Wayman's knowledge of the transfer. That had been admitted by Wayman in the bill, and the bank

had, therefore, a right to presuppose it in their interrogatory; but their object was to prove the early period of this knowledge. The testimony of these officers is from their own knowledge, and I can see no liability to the bank which would make them interested witnesses.

It seems to me to have been the duty of Wayman, undertaking to act upon his own responsibility in receiving any property, either in payment of the amount due to the trust fund by Jones, in consequence of this transfer, or as security for its payment, to have put the transaction in such a position that its character might be easily understood, and that any bad consequences flowing from its obscurity ought to fall upon him, and that the *cestui que trusts* have a right to give it in that case either character, as it may be most advantageous to them.

It is stated by Wayman, in his answer to the first petition of Jones and wife, in explanation of the transfers of stock to him, that he, as trustee, had, about June, 1830, purchased from Jones, stock of the Farmers and Mechanics Bank to the amount of \$850, which purchase was sanctioned by the Chancellor, and that he had subsequently purchased of Jones ten shares more, in the whole, twenty-seven shares, amounting to \$1370, which, he believed, had been transferred, but that Jones neglected to make the transfer, and that the transfer to him by Anne Jones, the administratrix, of thirty-four shares of that stock, as well as the deposit of \$1040 in the Savings Institution, was intended to secure the trust fund from any loss in consequence of the said neglect, and that it could not have been on account of the stock abstracted from the Farmers and Mechanics Bank of Frederick, because he was then ignorant that the stock had been so abstracted.

So much of this statement as relates to the \$850 seems to be correct. It appears from the proceedings that the purchase was authorized, and was treated as having been made, though as the Auditor remarks, it would seem from Jones' letter as indefinite as it is, that the transfer had been made, but it does not appear that that stock ever constituted a part of the trust fund, and if such transfer had been made about that time, it might

easily have been shown by any of the parties interested from the transfer books of the bank. In reference to the other ten shares, nothing can be found in the proceedings, and there is no evidence either of the purchase of them from Jones or the payment of the purchase money.

Mrs. Jones was entitled to, and received, the dividends on this stock, so that the principal only was due to the fund from her upon a settlement with her. It is highly probable, therefore, if not absolutely certain, that the stock transferred, to the amount of \$850, was intended as a compliance with Jones' contract, but not as to the ten shares, relating to which there is no proof. Wayman himself seems to have so treated it by going to the Orphans Court to obtain her a credit upon her account for it.

But why should he have taken a transfer of so large an additional sum as the residue of that stock and the deposit in the Savings Institution? There seems to have been no rational motive for it, and it is contradicted by the testimony of Hardesty, and the disproof of Wayman's answer as to his want of knowledge of the transfer of Jones and wife of the stock in the Westminster Bank, from which it may be fairly inferred that the said residue was taken as a reimbursement *pro tanto* of that stock. Mrs. Jones was permitted to receive the interest and dividends, which was improper if it was only a security and a balance, and was due, and the conversion of the deposit into stock is proved to have been at his instance, and in fact could not have been done but by his approbation. Whether this will make any difference as to Wayman's liability is another question, and which seems to be left open by the decision of the Court of Appeals.

Wayman having taken the transfer as reimbursement of the abstracted stock, and treated it as an actual and permanent investment on that account, ought to have reported all those matters to the court for its approval, but supposing the investment to have been a good one *at the time*, in the estimation of those skilled in such matters, as is clearly proved, and, therefore, such an one as to which no reasonable objection could have been made,

and the court, therefore, would have approved, would the mere circumstance of the trustee's neglect to report it, make him liable for any loss that should ensue? But little light is thrown upon this question by the opinion of the Court of Appeals. They say, "nor does it appear to us, satisfactorily, if the same had been transferred merely as a security, whether any act of Wayman for which he could be held accountable, conduced to the loss consequent upon the failure of that institution." 5 *Gill*, 354. From this we may infer, that if the transfer had been made as a security merely, Wayman would not be liable for the loss unless brought about by some interposition or agency of his, which is not pretended, but if *transferred as payment*, his liability for the loss is left by the opinion in considerable obscurity. It seems to have been considered important to ascertain for what purpose the transfer was made, but as to what liability Wayman would incur in consequence of having taken the transfer in payment, no further opinion is intimated.

It would, at the first view, appear to be hard that Wayman, having taken stocks esteemed perfectly good in the market, and such as the court, in all probability, would have approved as an investment, should, from his neglect alone to communicate the transaction to the court, be so severely punished for the consequence which may probably have resulted from his delay. But upon a further consideration, it will be found, that other facts have an important bearing upon the question.

The portion of the trust fund consisting of the abstracted stock, Wayman alleges, "he had nothing to do with," by which he seems to mean that it was the part intrusted to the supervision and management of his co-trustee, Stockett. But, notwithstanding this agreement for division of labor, if any fact endangering the safety of this fund came to his knowledge, he was bound to see to its security, and communicate the fact to the court and his co-trustee, and not, as he in fact did, take the management of it into his own hands, exercise his own judgment as to the value of the property transferred in payment, and conceal the whole matter from his co-trustee and the court. The court had, at one time, sanctioned the purchase of the Farmers and Mer-

chants Bank stock to the amount of \$850, and that transfer of the stock in that bank being treated, *pro tanto*, as an execution of the contract for that purchase, Wayman is not responsible for that, but, *non constat*, that the court, at the time of the transfer, would have directed the purchase of the same stock as an investment. If the proposition had been made to the court, the parties interested would have had an opportunity of objecting to it, and might have shown its impropriety then, or the Chancellor might have considered it better to have made any *further* investment in different funds, or in another bank. The same reasons will equally apply to the deposit in the Savings Bank.

Wayman had made investments before, and therefore knew that the approbation of the court was required, and should be first obtained by him. It would be very dangerous to trust property to permit trustees thus to throw off the superintending power of the court, and not to be responsible for losses incurred by the exercise of their own discretion, although not incurred by any direct action in reference to the management of the fund. I think, therefore, that Wayman is responsible both for the diminished value of the residue of the stock of the Farmers and Merchants Bank above the \$850 purchase, and for the amount lost in the Savings Institution. He is liable also for simple interest from the time of the transfer, except where Mrs. Jones has received the dividends to which she was entitled, unless they may be required to make up the amount for which she is responsible. As to the \$1,000 received from Hardesty, it is admitted that Wayman is responsible for it, with interest from the time of the receipt.

Mrs. Jones, as administratrix of her husband, is responsible for the residue of the abstracted stock remaining due after the deduction of the value of transferred stock, for which Wayman is decided to be responsible, and can receive nothing until that be paid, the Court of Appeals having so decided. She is also responsible as distributee for the amount of her husband's estate distributed to her, and the other distributees, her wards, are also answerable for the amount received by them from the estate of their father, and which ought to have been applied to

making good the deficiency in the trust fund occasioned by the abstraction of the bank stock, to the relief of Mrs. Jones also to that extent. The banks, according to the true construction of the opinion of the Court of Appeals, as contended for in the third and fifth exceptions of Stockett, can only be discharged from their responsibility by satisfaction actually made by Wayman and Mrs. Jones, as to the extent of their liabilities. They are also responsible each for the whole amount ascertained in Stockett's first exception. These views appear to dispose of all the disputed points on the exceptions, and an order may be drawn accordingly, and referring the case again to the Auditor, to make the necessary alterations in the accounts.

[The preceding opinion was delivered on the 2d of June, 1850, after which the cause again came before the court upon further exceptions to the Auditor's report and accounts, when the following opinion was delivered by the Judge, on the 18th of July, 1850.]

OPINION BY JUDGE BREWER :

This case comes up again on exceptions to the Auditor's report of June 20th, 1850, and some of the former exceptions not acted upon. The exception of Stockett, and the first exception of Wayman, are ruled good in part only. That portion of the former order of June 2d, which would charge Wayman, being founded in error as to the fact. The Auditor's report of the 2d of February, 1831, and the trustee's report of the 23d of June, 1830, which would have shown the error, were not among the papers selected and sent to the court, and the Judge relied on the information of the counsel, who were also misled. The fact is now admitted, that Wayman purchased from Jones twenty-seven instead of seventeen shares of Farmers and Merchants Bank stock, and that the purchase was sanctioned by the court. Of course, he is not to be charged with any loss on that amount of stock by depreciation, but is to be charged with the loss on the seven shares now agreed to be taken as an investment at the former selling price. Wayman will, of course, be credited with these seven shares.

Wayman should not be charged with interest on the \$1040 of the stock of the Maryland Savings Institution during the time that Mrs. Jones received the dividends, but from the time she ceased to receive them. As to the banks and the children of Mrs. Jones, the *cestui que trusts* in remainder, at least he should be charged with interest. Wayman's third exception is, therefore, ruled good as to part, and overruled as to the residue accordingly. Wayman should also be charged as to Mrs. Ann Jones with the dividends or interest in case there be no proof of dividends, of the twenty-seven shares of Farmers and Merchants Bank stock, from the time of their purchase to the date of the transfer, according to the exception of Mrs. Ann Jones, which is ruled good, but not as to the banks or the *cestui que trusts* in remainder.

Wayman is right in his fourth exception, as the administratrix of Samuel Jones should be charged with the amount of abstracted stock not received by him, (Wayman,) or which he is responsible for, but that would not affect the state of his account. The fifth exception is also right if Mrs. Jones has not already been charged with the sum, but I do not see how Wayman can be credited, he being charged only with what he received.

It was not intended by the order of June 2d, that Mrs. Jones should be charged in this case individually in the second place, but that the estate of her husband, Samuel Jones, should be, and for whatever that was liable, it being distributed, she and the other distributees should contribute in proportion to their distributive shares.

Wayman's sixth, seventh and eighth exceptions are overruled. It is clear, from the opinion of the Court of Appeals, that Mrs. Jones is not to be made liable individually for any portion of the abstracted stock, unless her husband, Samuel Jones' estate should be insufficient.

It was contended by the counsel for Wayman on the first argument in this case, that Mrs. Jones was bound, by the decree of the Chancellor, passed on the 23d of October, 1846, on her petition against Stockett and Wayman, she not having appealed from it, and, therefore, although Wayman should be charged

with the amount of the stock of the Savings Institution with reference to the banks and *cestui que trusts* in remainder, yet, as regards Mrs. Jones, he is not to be charged with it. The effect of this would be, not that Mrs. Jones would be charged with it, but that she would lose her interest or dividends on that amount. The decree could not affect her husband's estate, as the petition is filed by her, and revived by her husband and herself in her own right and not as administratrix, and nothing more is decreed than that Wayman was not responsible.

But how is she bound by that decree? It was passed on the 23d of October, 1846. The decree in the present case, was passed on the 15th of November, 1845, from which an appeal was entered by Mrs. Jones on the 11th of February, 1846. On that appeal the court decided that Wayman, though complainant, may be required to account as defendant, and would be answerable for this stock, or not, according to the further proof to be taken. Such of course ought to have been the decree of the Chancery Court, and all those interested in this part of the trust fund being parties in this case, and it being perfectly competent for the court to decide all the interests in the case, the decree, as it is called, of the 23d of October, 1846, or rather the *order*, could not be properly passed, and must be superseded by the final decree or order in this case.

But is that decree or order conclusive upon this court, even confining the question to that case? Here is a trust fund invested by the court and in the hands of the trustee. By some means the trust fund is abstracted, and one of the *cestui que trusts* alleging that the trustee has obtained stocks and money from the person so abstracting it, by way of reimbursement, files a *petition in that case*, which is the usual mode of proceeding, calling upon the trustee of the court to account for these funds, and the Chancellor passes an order directing the account to be stated, and specifying, as is supposed, to some extent, the responsibility incurred by the trustee. There is no formal proceeding by original bill and answer. The Auditor states an account accordingly, but recommending a suspension of final action in the case until a decision is had in another case, where

all those interested in the fund are parties, and the Chancellor acting on that report, confirms it in part, to wit, as to the money received, but further says, "for the reasons stated by the Auditor in his said report, I do not consider it proper, at this time, to pass any order in relation to the stock referred to in the account A. No. 1," and with regard to this stock no further decision has taken place to this day.

It is obvious, that the Chancellor did not consider the order of the 23d of October, 1846, conclusive on him, else why reserve further action upon it? It is not clear, that the Chancellor intended to express the opinion imputed to him. He says, "it being stated in the petition that certain stocks were transferred to the trustees to be held as a means of enabling them to obtain an indemnification from certain losses, arising from the misapplication of the trust estate as therein mentioned, it follows, that they must be allowed to continue to hold the same until the amount of such losses have been ascertained, and further order, and cannot be charged with its depreciation or becoming valueless *during the time of its being so held by them.*" He might have meant during the future holding under his order, but if he meant the whole time, the order does not appear to me to be conclusive upon any right of the parties.

The Chancellor proceeds further to decree an account from the pleadings and proofs in the cause, and from such *other proofs as may be laid before him.* He decides no principle here *without the decision of which* the account could not be stated. It is not like the case of *McDonald vs. Strike*, 2 Har. & Gill, 191, where it was upon an original bill absolutely necessary to establish the fraudulent character of the deeds before any account could be decreed, nor the case of *Thompson vs. McKim*, 6 Har. & Johns., 302, where the Chancellor decided upon the construction of an agreement upon which the whole case depended, and directed money to be brought into court in consequence of his decision; nor like the case of *Williamson vs. Carnan*, 1 Gill & Johns., 184, where the defendant was, by the order of the court, compelled to do an act in derogation of his rights. But this case is very like that of *Hagthorp vs. Neale*, 1 Gill & Johns., 270, where the Chancellor not only directed an account, but

expressed his opinions decidedly on many items of the account, yet it was held, these opinions were subject to the review of the Chancellor, and the whole case only to be acted upon after the report, and, therefore, that an appeal did not lie. The case of *Hungerford vs. Bourne*, 3 *Gill & Johns.*, 133, is a case also in point. This case is as strong as either of the last two cases, for the Chancellor merely expresses an opinion as to some of the items of the account and leaves the whole matter to be finally adjudicated upon, according to the aspect of the case when further testimony which might possibly materially affect it should be taken and the report and account filed. No right being finally determined by that order it cannot be considered as conclusive on any of the parties to the case.

This question seems also to be settled by the act of 1830, ch. 185, sec. 1, which provides that "no appeal shall be allowed from any order or decree unless it be a *final decree*, or an *order in the nature of a final decree*." What a final decree is we need not say. An order in the nature of a final decree is just such an one as the Chancellor has declined to pass in this case, to wit, "an order confirming the Auditor's report." See 2 *Bland*, 264, *Contee vs. Dawson*.

This case has not been argued upon the exceptions of Mrs. Anne Jones to either of the reports and accounts of the Auditor, so that a decision on some of the points in which she was interested, and which is now desired, was neglected.

With regard to her exceptions filed on the 12th of January, 1850, the second exception is overruled. As to the first and third, the amount charged against Wayman by account A., should be lessened as to Mrs. Jones, by interest on the Farmers and Merchants Bank stock, during all the time that she received the dividends, but he is to be charged further, according to her exception last filed, with interest, from the time of the purchase to the time of the transfer. His account is not to be lessened by the principal of the Savings Institution stock, nor by the interest, except during the time that she received the dividends.

As to the exceptions to the accounts B. and C., the Auditor will be governed by the same principles decided on in the account A.

I am not aware of any other matter now in dispute in the case, except the question of costs. Any costs incurred or paid by Stockett alone, if there be such, should be paid out of the funds, as they were not incurred by his default or misconduct. The banks cannot be allowed costs, as the litigation in this matter never would have taken place but for their negligence, nor can Wayman be allowed costs, he being equally culpable. The costs of Mrs. Jones and the *cestui que trusts* may be allowed out of the fund, as it will in that case fall upon them in nearly just proportions in consequence of their respective interests in the fund.

[On the 6th of December, 1850, a further opinion was delivered in the case, upon the submission of the corrected accounts for ratification.]

OPINION OF JUDGE BREWER:

This cause is again submitted on the Auditor's report of August 13th, 1850, and the accounts corrected in pursuance of the order of the court, of July 18th, 1850. The accounts F., G., J. and K., corrected, seem to be in conformity with that order. Mrs. Jones is not, however, to be charged with any portion of the interest which would otherwise have been payable to her, to the exoneration of her husband's personal estate, from which she is to contribute one-third. Accounts F., G., J. and K., corrected, are, therefore, hereby ratified and confirmed, and a decree or order may be prepared in conformity therewith, with the exception above stated.

Accounts J. No. 1, and K. No. 1, corrected, are rejected. The decision as to costs will be governed by the order of July 18th. The expense of stating the accounts, to wit, Auditor's fees, although charged by him to the banks, are not more their costs than the costs of the other parties, and should be paid in equal proportions by the banks, Wayman, and Mrs. Jones, as administratrix of her deceased husband.

A. RANDALL, for Wayman.

McLEAN and ALEXANDER, for the other Parties.

RICHARD IGLEHART

vs.

EDWARD LEE AND CHARLES F. MAYER.

JULY TERM, 1848.

[CHANCERY PRACTICE—INJUNCTION.]

To a bill for an injunction, restraining execution of a judgment at law, the defendant filed a general demurrer, which was overruled by the Chancellor, and the injunction made perpetual; upon appeal, this order of the Chancellor was reversed, and the cause remanded for amendment in order to make necessary parties. **HELD**—That when the bill is amended, the defendant will have a right to answer it.

Where the party against whom a judgment at law has been rendered, did not, before or at the time of its rendition, know of facts which would have constituted a valid defence at law, so that he could not then have availed himself of them, he will be entitled to relief in equity against the judgment.

[The original bill in this case was filed by Richard Iglehart, on the 2d of October, 1838, and states, in substance, that on the 28th of September, 1829, a writ of *fieri facias* was issued out of the Court of Chancery, on a decree passed in a cause, in which Caroline Duncan and William B. Duncan were defendants, and was directed to complainant, the then sheriff of Anne Arundel county. That when the writ came to his hands, the defendants therein were infants, and Joseph Robinson was their guardian; that said infants were possessed of a farm in said county, which their said guardian, under the direction of the Orphans Court, rented to Edward Lee, upon the terms that he was to pay as rent to said guardian, one-third part of the annual crop of tobacco and grain; that though the crops had usually been sent to Baltimore and sold before division, yet, by the express terms of the renting, one-third thereof belonged to said infants, on the ground, and their guardian had the right to come on the farm and receive the rent in kind as soon as the crops matured. That there was at the time a matured crop of tobacco on the farm, raised by Lee, under this renting, one-third of which belonged to the infant defendants in the writ, upon which complainant levied the writ. That his right to make this levy being questioned, he afterwards, on the 27th of

October, 1829, at Lee's request, executed to him a written agreement to save him harmless upon paying over to complainant the proceeds of sale of said third part of said crop; that Lee thereupon took the tobacco to Baltimore, sold it, and paid over to complainant the proceeds, which he paid to the counsel for the plaintiffs in said writ in satisfaction thereof.

That on the 9th of October, 1829, before he executed said written agreement, or received the proceeds of sale, Robinson commenced an action of trespass against him in Anne Arundel County Court, for making said levy; that at October term, 1833, this action, by consent of parties and under rule of court, was referred to two referees; that pending this reference, Robinson, to sustain the issue on his part, produced the affidavit of Lee, which, with other testimony, was laid before the arbitrators, and the whole case being fully investigated by them, they, on the 21st of October, 1834, returned an award in favor of complainant, and directed a judgment of *non suit* to be entered in said case, which was done by said County Court on the 29th of the same month, no exceptions to the award having been filed by Robinson.

That pending this action of trespass and before the reference thereof, to wit, on the 10th of August, 1832, Robinson knowing that Lee held complainant's said written agreement, commenced an action in said County Court against Lee, to recover the money in the form of rent, which Lee had so as aforesaid paid to complainant, which cause came on for trial at the October term, 1834. That though Lee knew of the decree and *feri facias*, and the levy aforesaid, and the pendency of said action of trespass, and had himself given testimony therein, which formed a perfect defence in a suit against him, Lee, yet he omitted to plead, or adduce in evidence, or insist upon said matters in defence, and wholly omitted and neglected to give complainant notice, or call upon him, or give him an opportunity of urging said matters in defence of said suit, and at the trial actually abandoned the defence he had made, and consented to a verdict and judgment against him, waiving at the same time a decision of the court, that the action could not be sus-

tained against him in the form in which it was brought; all of which the said Lee did without notice to, or conference or consultation with, complainant or his counsel, though he knew he held complainant's written agreement aforesaid, and looked to complainant to be ultimately and solely affected by and responsible for his said acts in the premises.

That Lee, at the time he agreed to waive the decision of the said court in his favor, and submit to the verdict and judgment against him, did so in pursuance of an agreement and stipulation with Robinson, and obtained the latter's express covenant and assurance that he, Lee, should in no way be bound by said judgment, or injured or affected thereby, or ever called upon to pay a farthing of the amount for which it was rendered, but that the same should be instantly entered satisfied on the records of the court, which was accordingly done by Robinson on the same day it was rendered, without ever demanding from Lee one cent on account thereof, and the latter has, in fact, never paid anything on account of the same, or been in any way affected, injured or damnified thereby, or by any claim that has ever been brought against him on account of said one-third of said crop of tobacco, or the value of the proceeds of the sale thereof.

The bill further charges, that pending the suit of Robinson against Lee, the latter well knew of the matters and facts which constituted a valid defence thereto, he having himself sworn to them in the affidavit before referred to, and if they were not susceptible of proof in a court of law in consequence of the lease of the farm not being in writing, or of there being no witnesses to the terms thereof set out in his affidavit, and which made one-third of said crop of tobacco the property of the aforesaid infants at the time it was levied on, it was competent to, and incumbent on, Lee, and was his legal duty to complainant to have filed a bill of discovery against Robinson, to compel him to disclose, under oath, the aforesaid matters and facts of which, from their nature, he must have been cognizant, to be used as evidence in defending said cause, and that Lee, thus knowing of a good and substantial defence to

said cause, and omitting to adduce proof of it, or, in the absence of other proof, to file a bill of discovery as aforesaid, cannot, under complainant's said written agreement, nor will he be permitted by a court of equity to charge complainant with the effects of any judgment recovered against him in consequence of such omission, or otherwise, even had he been damnified thereby; and that the said conduct of the said Lee in the premises is a fraud upon complainant's rights, against the effects of which a court of equity will grant relief.

That it was a part of the agreement between Robinson and Lee, that after the judgment was rendered against the latter, and satisfaction thereof entered, (all of which was done for the sole purpose of forming untrue record testimony against complainant,) he, Lee, should sue complainant on his said written agreement, and the proceeds of the suit go to the benefit of Robinson, and that to sustain the same at the time the said untrue record evidence should be adduced by Lee, to show he had suffered damage within the meaning of complainant's said agreement. That in pursuance of this understanding and agreement, Lee, on the 4th of April, 1835, commenced suit against complainant in said County Court, on said written agreement, setting out in his declaration as a breach thereof the recovery of the judgment against him by Robinson, and most untruly averring that he had paid to the latter the sum of money for which the same was rendered. That this cause so commenced was entered on the docket for the use of Charles F. Mayer, the counsel for Robinson, and came on for trial at the October term, 1837, of said County Court, when Lee adduced as evidence the said written agreement, proved the sum for which the one-third of said crop of tobacco sold, and produced the record of the judgment against him in favor of Robinson, with the entry of satisfaction thereof as the only evidence to show his right of action, and the extent to which he was entitled to recover, and a verdict and judgment was thereupon rendered against complainant for the sum of \$292 09, with interest from the 24th of October, 1837, and costs, in favor of Lee for the use of said Mayer.

That, at and up to the time of the trial of this cause, complainant had no knowledge of the aforesaid arrangement between Robinson and Lee for entering the judgment against the latter, satisfied upon the record, or of Lee's having assented to the same, or that he had not paid the amount thereof to Robinson ; that had he known of these facts, he had no means of proving them in a court of law, if, indeed, such proof could have been admitted to contradict the record evidence aforesaid.

The bill then charges that Lee is threatening to issue execution upon the judgment so as aforesaid rendered against complainant, and prays for an injunction restraining the same, and for general relief, and makes said Lee alone a defendant.

The agreement of Iglehart, dated the 27th of October, 1829, on which suit was brought by Lee, is exhibited with the bill, and is as follows :

“Whereas, a crop of tobacco, packed in hogsheads, in the possession of Mr. Edward Lee, one-third of which said crop has been levied on by me by virtue of a writ of *feri facias*, issued out of the High Court of Chancery against Caroline Duncan and others, at suit of Perry Townshend and wife, and whereas, the said crop of tobacco has been sold and disposed of by the said Edward Lee, who is willing to pay over to me, as sheriff of Anne Arundel county, the proceeds as of one-third in amount of said sales, provided he shall be made safe and indemnified in the same from all loss or suits by any person or persons setting up a claim to the one-third part of the sales of said crop of tobacco. Now, I, Richard Iglehart, sheriff of Anne Arundel county, do hereby agree to indemnify and save harmless, the said Edward Lee, from all loss or damage whatsoever, either at law or in equity, against all and every person or persons claiming or to claim any part, share or interest in the said one-third part of said crop of tobacco, upon his paying over to me the proceeds of the one-third of the sales of said crop.”

The affidavit of Lee, referred to in the bill as having been laid before the arbitrators in the trespass case against Iglehart, as also the declaration in said case, and a copy of the docket

entries of the judgment recovered by Lee against him, are filed as exhibits with the bill.

In this affidavit, made on the 2d of September, 1833, Lee swears that he rented the land of which the late William Duncan died seized, for the last seven years, from Robinson, as guardian of William B. and Caroline Duncan. "That the terms upon which he rented were, that Robinson should receive one-third of the annual crops of tobacco and grain, which have usually been sent to Baltimore to be sold, and the proceeds divided between deponent and the said Robinson. That by the terms of the contract the said Robinson had a right to receive his part of the crops in kind, and was not obliged to wait for the sales. That during the second year of deponent's tenancy, as well as he recollects, in the latter part of the summer or early part of the autumn, Richard Iglehart, then sheriff of Anne Arundel county, levied on the land and on the tobacco raised the previous year, to wit: Eleven hogsheads of tobacco to satisfy a *feri facias* issued, as deponent understood from Iglehart, out of the Chancery Court, at the instance of Perry Townshend and wife, against William J. B. Duncan and Caroline Duncan. That the said tobacco was, by permission of said Iglehart, sent to Baltimore by this deponent for sale, was sold, and one-third of the proceeds paid to said Iglehart."

The Chancellor granted the injunction as prayed, and after the return of the subpoena, an attachment was issued against the defendant at December term, 1838, returnable to the March term, 1839, which was then returned attached, and an order, *pro confesso*, passed, requiring the defendant to appear and answer, plead or demur to the bill, on or before the 4th day of the following July term. Under this order the defendant appeared on the 12th of July, 1839, and filed a general demurrer to the bill, in which the complainant joined. The cause was then continued until March term, 1844, when the defendant, by his counsel, submitted the demurrer to the Chancellor for decision, asking leave "to answer in case the demurrer should be decided against him." At the same term, the Chancellor, (*Bland*,) passed a decree overruling the demurrer and making the injunction perpetual.

From this decree the defendant appealed, and the Court of Appeals, (*Archer, C. J., Dorsey, Chambers, Magruder and Martin, J.,*) at its December term, 1845, reversed the decree of the Chancellor, and remanded the cause, *Magruder, J.*, delivering the following opinion of that court.

"In this case the bill of complaint does not bring before the Court the necessary parties, and for this reason the decree must have been reversed and the bill dismissed but for the act of 1818, *ch.* 193.

"Before a final decree, the necessary parties must be made and have an opportunity of showing why the complainant should not obtain the relief which he seeks. We shall, therefore, remand the case to the Chancery Court.

"When the bill is amended, the defendant will have a right to answer it."

The cause being reinstated in Chancery, the bill was amended by making Charles F. Mayer, the party for whose use the judgment against Iglehart was entered, a party defendant, who appeared and filed his answer on the 27th of March, 1847.

This answer avers, that he knows nothing of the levy on the tobacco spoken of in the bill, but does know that Robinson asserted his right to one-third of said tobacco, or of the value or proceeds thereof, and contended that the infants of whom he was guardian, were not legally nor equitably entitled to said one-third, especially as he, in his guardian's accounts, had accounted for the full rent of the farm whence the said crop issued. That defendant believes Robinson was right in all these, his pretensions, and that the levy spoken of was an unjust proceeding, and virtually, if not technically, a trespass on his property, either directly or through the legal or ostensible rights of the tenant, Lee.

He admits that Robinson sued Iglehart in trespass, and that the case was referred to referees, who awarded that the former should be non-suited, but he denies that this award was made on the merits, but was founded on the position that Robinson had no such property specifically in the tobacco as entitled him to bring trespass for it, and that the result of this decision

was, that the only priority in the matter was between Robinson and Lee, and that the latter was answerable to the former for the one-third of the proceeds of the tobacco, or to render him that third in kind. That in this view, which is founded on what transpired, as the defendant believes, and, as he asserts, on the remembrance he has of the proceedings, the decision of the referees formed no defence for Lee against Robinson in the latter's suit against him, and concluded nothing upon their relative rights and liabilities.

That he knows not what occurred in the course of the trial of Robinson's suit against Lee, but he maintains that the latter was justly and legally liable to the former for the amount for which the judgment was rendered, as being for the proceeds of the former's one-third of the tobacco raised from the farm, and that the judgment was therefore fairly rendered, and none of the considerations objected by the bill would have availed either equitably or legally to prevent a judgment or stay its execution. He knows nothing of any agreement between Lee and Robinson for rendering judgment in said suit or for afterwards having a suit prosecuted by Lee against Iglehart on the indemnification agreement referred to in the bill, nor does he know whether Lee actually satisfied the judgment obtained against him by Robinson, but he denies that Iglehart is concerned to inquire whether said judgment was satisfied actually by Lee, inasmuch as in any event Iglehart's agreement bound him to satisfy it himself, and thus truly, according to the terms and honesty thereof, to indemnify and save harmless the said Lee. He denies that Iglehart is entitled to any relief against his own act in allowing a verdict and judgment against him, when if he had any defence, (which is denied he either legally or morally had,) the law and the occasion of the trial put all the means and materials of defence at that period in his power, and especially since the judgment is only for the amount he was bound to pay to Lee or to Robinson, if the latter had, in equity, claimed the benefit of the former's claim against Iglehart, under the agreement for indemnification.

He denies that Lee's judgment against Iglehart was recov-

ered only ostensibly for this defendant, and really and in truth for Robinson, but avers that the claim on said judgment is entirely and truly the property of this defendant, and his on valuable considerations, and that the whole avails thereof are to go and accrue to him.

The answer of Lee, which was filed in July, 1847, admits that he rented the land from Robinson, which he understood and believes belonged to his, Robinson's wards; that the rent agreed upon was that he was to pay one-third of the crops raised on the land to Robinson, in specie, but the usual course of their dealings was for Robinson to take his third of the grain on the land in specie, and his third of the tobacco in money, after the whole crop was sold.

He admits that in September, 1829, Iglehart, as sheriff, professed to levy the execution described in the bill, on one undivided third of the crop of tobacco which he had made as tenant on said land, but he denies that there was or could be any legal levy thereon; that he nevertheless sold the same, and after the sale, both Robinson and Iglehart claiming the proceeds and threatening to sue him for one-third thereof, he, at the latter's instance, who urged him by misrepresenting the true facts of the case, paid over to him the proceeds of said third, he assuring respondent it was right and proper to do so, and giving him the bond of indemnity referred to.

He says he does not know or believe he was ever informed of any of the particulars of the suit or trial, or proof on the trial between Robinson and Iglehart, or the award therein or the determination thereof. He does not recollect of ever having made the affidavit filed with the bill, but from its examination he believes it is correct, and the facts therein stated to be true; that he has no knowledge, recollection or belief as to the object of obtaining said affidavit, or who assented to it or obtained it, or the use to which it was applied, or that it was ever offered in evidence, or the effect of it if ever used.

He admits he was sued by Robinson for the rent which he so paid to Iglehart, and that judgment was obtained against him therefor. He denies that he knew any more of the said

decree or execution thereon than the statements he received from complainant, most of which he has since found were erroneous and untrue.

He denies that he ever knew of the pendency of the suit of Robinson against complainant, or of his having ever given any testimony therein. He does not know or believe that his attorney ever omitted to plead or adduce evidence in the case against him by Robinson, or neglected to give complainant notice thereof, or an opportunity of defending the same, or that he abandoned his defence therein, or consented to a verdict or judgment against him, or waived any decision of the court upon any points presented to it pending said trial. That he left the whole matter to his attorney, with directions to save him harmless from twice paying this rent, and though he cannot positively aver, yet he believes and insists that Iglehart, through his attorneys or otherwise, knew all that took place in said cause between Robinson and respondent at the time it took place, the object of said suit, his own interest therein, had all the means of defending the same, and yet refused to aid and assist respondent in defending the same or to defend it himself, at his own cost, as in law and conscience he was bound to do, and as respondent wished him to do. He denies that Robinson's action could not be maintained against him. He does not know whether Robinson knew that respondent held this indemnity or not when he brought suit against respondent.

He admits that he always did look to Iglehart's agreement as his indemnity, and held him responsible thereon for his acts in the premises, and supposed, as Iglehart knew of this controversy, he would retain the money until all the suits were settled, or have taken security and indemnity if he had paid it away, and if respondent's attorney did not give special notice to complainant, it was because he believed it unnecessary, as before stated, or because he and his attorney supposed Iglehart had the money ready in hand to await this decision, and had no interest whatever in the suit between Robinson and respondent.

He denies that he ever did, to the best of his knowledge, in-

formation or belief, before or at the time the judgment was entered against him in favor of Robinson, agree with the latter, or enter into any stipulation with him in relation to said judgment, that it should be released, or that respondent should not be injured or affected or bound by it, or ever called on to pay it, or that it should be instantly entered satisfied; and he denies that it was in fulfilment of any such prior agreement that it was entered satisfied, or that it was so entered on the day it was rendered. He denies that he ever did know, pending said suit against him by Robinson, of any good or valid defence thereto at law or in equity, or that he ever knew of any matter in relation thereto of which complainant was ignorant.

He admits that he never did pay the said judgment to Robinson, and he believes that his attorney agreed, after said judgment was rendered against him, to give to Robinson or any one else he should designate, the said indemnity of complainant, if Robinson would enter said judgment previously obtained, satisfied; but he does not know this to be the case, nor does he know how long after the rendition thereof it was before it was entered satisfied. On consultation with his attorney, neither he nor respondent has any recollection whatever of what did take place before, at the time, or after that judgment, but he is advised, and insists, that after complainant had refused or neglected to defend said suit, or to pay the same, he having, as before stated, the means in his own hands, placed there by respondent for that purpose, and your respondent was about to be compelled twice to pay this rent, because of the failure on the part of complainant to comply with his aforesaid contract, it was defendant's right to prevent the perpetration of this fraud by complainant, and to sue, or assign to any one to sue, said indemnity, and he believes that under these circumstances his attorney might, as he had authority to do, have agreed that if said judgment was struck out, he would let Robinson have any benefit he could have for said indemnity.

He admits that suit was instituted in his name, for the use of Mayer against complainant and the recovery of the judgment filed, but does not know what proof was offered therein,

but supposes the two attorneys of complainant can prove the same, but he does not know, nor has he reason to believe, that Mayer was counsel for Robinson.

He denies that the only objects of entering the judgment against him, and the satisfaction thereof, was to form untrue record evidence to be adduced against complainant in a suit to be thereafter brought, and at that time agreed to be brought by respondent against complainant. That he does not know what evidence was adduced, or what proceedings took place at the trial of the suit for the use of Mayer, because he was not made acquainted therewith.

He admits that he never did pay in money the judgment so recovered against him by Robinson, or suffer other damages than some costs and expenses, but when about to be compelled to pay the same after its rendition, and thus to pay the said rent twice, he did agree that Robinson might use the indemnity which complainant gave respondent to recover his debt of complainant, if Robinson would enter this judgment satisfied, which he or his attorney did.

He admits he is not to receive any benefit from the judgment against the complainant, which if ever paid, he believes, though he does not know, will go to the use and benefit of Robinson for the rent he has lost in the value of said tobacco, which complainant illegally and improperly received from respondent, and prevented him from paying as was right and proper he should do, to Robinson.

He avers that the trial of Mayer's cause against complainant did not take place until years after the two other suits had been decided, and after all the facts and statements on which complainant now pretends to rely had taken place, all of which were, therefore, well known to him and his attorneys, and if of any avail, could have been offered in evidence, either at law or by proceedings in equity at the said trial, yet complainant neglected to use them, and permitted judgment to be recovered against him without summoning a witness, and defendant insists that as these defences were not made at law, complainant is forever precluded from opposing said judgment.

He insists that the trespass case, on which the *non-suit* was entered, was irregularly decided, and not upon the merits, and could not preclude Robinson from holding respondent liable for the rent. He denies all fraud with which he stands charged, avers that the course taken by him was fair and just, and requisite to protect himself from the fraud and imposition about to be practiced upon him by complainant, by compelling him to pay the same debt twice, and pleads the statute of limitations to the claim set up by the bill.

[After the filing of these answers, a motion was made to dissolve the injunction, upon the hearing of which, the Chancellor delivered the following opinion, on the 5th of July, 1848.]

THE CHANCELLOR :

That the bill in this case states facts, which, if proved, or admitted, constitute a good defence against the judgment at law seems too clear for controversy. The Court of Appeals must have thought so, as otherwise, instead of remanding the record for amendment and further proceedings they would have dismissed the bill.

The question then is, have the answers removed the equity of the bill? I think not. That of Mr. Mayer cannot have that effect, because he does not profess to know, and could not know the circumstances upon which the equity is founded. The answer of the defendant, Lee, is vague and unsatisfactory, and with every disposition, as is manifest, to get rid of the injunction, leaves many of the material facts of the bill unanswered. There is a good deal of confusion in his statement of the understanding and terms upon which the judgment at suit of Robinson against him was rendered. He admits that the judgment was entered satisfied, though he paid no part of it, and states that neither he nor his attorney, has any recollection of what took place at the time of or after its rendition. He denies that, according to the best of his knowledge, information or belief, he made any agreement with Robinson in relation to said judgment, either prior to or at the time it was entered, to the

effect that it should be released, &c., but he confesses, as before stated, that it was released without his paying one dollar in satisfaction of it, and he also admits, that after the judgment was rendered, his attorney agreed to give up to said Robinson, or any one else he should designate, the contract of indemnity executed by the complainant, Iglehart, if Robinson would enter the judgment satisfied. The denial of the previous agreement, it will be observed, is not positive, whilst facts are admitted which have a powerful tendency to prove such agreement.

Robinson, according to the answer, had a valid judgment against Lee, fairly recovered, and of course, capable of being enforced by execution, and yet without any previous agreement upon the subject the answer asserts that this judgment was entered satisfied, though not one cent was paid in its discharge, the plaintiff, Robinson, being content to rely upon the issue of a suit upon Iglehart's contract of indemnity. This statement certainly is extremely improbable, and cannot obtain credit upon this motion, unless vouched for by the most unequivocal assertion in the answer, which assertion has not been made. Before a suit could be maintained upon the contract of Iglehart to indemnify Lee, it was necessary to show that the latter had been damnified, and the suit of Robinson against Lee, the recovery in that suit, and the entry of satisfaction without payment, bear strong marks of contrivance and of a purpose to manufacture evidence upon which proceedings against Iglehart could be founded.

The whole machinery appears to have been put in motion to create a fictitious cause of action against Iglehart, and certainly should not be allowed to succeed, unless there is some rule of law or of equity which forbids the interposition of this court. My opinion is there is none such. The complainant states expressly, that he did not know of these defences before or at the time of the rendition of the judgment against him, and, therefore, even if they would have constituted a valid defence at law, he could not have availed himself of them. This brings his case within the principles settled by the Court of Appeals, in the cases of *Gott & Wilson vs. Carr*, 6 *Gill & Johns.*, 309, and

Dilly & Heckrotte vs. Barard, 8 *Gill & Johns.*, 171. I shall, for these reasons, sign an order continuing the injunction.

[The commission to take testimony was subsequently returned unexecuted, and the cause was, at December term, 1849, submitted for final decision, when the Chancellor passed the following order.]

THE CHANCELLOR :

This cause having been submitted on the part of the complainant during the sittings of the term, is now laid before the Chancellor without argument. And this court being of opinion, for the reasons stated on the 5th of July, 1848, as the grounds upon which the order of that date was passed, that upon the bill, answers and the other proceedings then appearing in the cause, the complainant was entitled to be relieved against the judgment mentioned in the proceedings, and the commission to take testimony then outstanding having been returned unexecuted. It is, thereupon, this 17th day of January, 1850, by John Johnson, Chancellor, and by the authority of this court adjudged, ordered, and decreed, that the judgment in the said proceedings mentioned at the suit of Edward Lee, use of Charles F. Mayer, the defendants in this cause, against Richard Iglehart, the complainants, recovered in Anne Arundel County Court, at the October term thereof, in the year 1837, be, and the same is hereby perpetually enjoined. And it is further adjudged, ordered and decreed, by the authority aforesaid, that the complainant recover his costs against the defendant in this case, to be taxed by the Register.

[From this decree the defendant, Mayer, appealed; which appeal is still pending.]

J. J. SPEED, for Complainant.

A. RANDALL, for Defendants.

MORGAN HARRIS AND ETHELDRA,
 HIS WIFE,
 vs.
 WILLIAM MORRIS.

DECEMBER TERM, 1847.

[EVIDENCE.]

Two co-heirs executed a deed of partition, in which they mutually covenanted that each should hold his part of the land free, and discharged from all title, interest, claim and demand of the other, but neither covenanted to assume the title of the other. **HELD—**

That one of these co-heirs is a competent witness for the other in an action brought by the latter against a third party, involving the title to a part of the estate conveyed to the plaintiff by the deed of partition.

A vendor of land selling in good faith is not responsible for the goodness of his title beyond the covenants in his deed.

[The bill in this case was filed by Morgan Harris and Etheldra his wife, to enjoin an ejectment suit brought by the defendant, William Morris, for a tract of land called "Morris Landing," and to obtain a conveyance of the legal title to the same by a decree for the specific performance of an agreement between said Morris and Samuel Chapman, the ancestor of complainant's said wife, in relation to the sale of said land.

It alleges that in 1817, Samuel Chapman, of Charles county, discovering a vacancy adjoining his lands on the Potomac river, agreed with said Morris that they together should take up the same; that the patent should issue to Morris, but the land should be held equally between them, each owning one-half thereof; that said Chapman paid \$77 27, the caution money, on the 1st of March, 1817, to the state, and the receipt of the treasurer therefor is exhibited with the bill; that in pursuance of this agreement, the land was patented to Morris, and called "Morris Landing," containing 52½ acres. That afterwards, said Chapman being about to sell all his lands on the Potomac, purchased of Morris all his interest in said tract, being one moiety thereof. That in part performance of this contract, said Chapman was put in possession of the whole tract, and remained in possession thereof from that time until his death,

in 1825. That the complainant, Etheldra, is one of the heirs at law of said Chapman, and in the division of his real estate, this land was allotted to her as a portion of her inheritance, and that complainants have been and still are in possession of the same, but Morris has never executed a deed therefor, but has instituted an action of ejectment to recover possession thereof. The bill then prays for an injunction to restrain this ejectment suit, and that Morris may be decreed to convey the title to the land to complainants, and for general relief.

Morris, in his answer, says, he is ignorant of the alleged division of Samuel Chapman's estate, and positively denies any contract or agreement on his part for or touching one-half or any part of "Morris Landing." He avers that, being interested in certain lands formerly belonging to one Knox, he was informed of the vacancy called "Morris Landing," and accordingly, in 1817, obtained a special warrant to affect said vacancy, as appears by the patent and surveyor's records, exhibited with his answer. That about the same time, for the benefit of himself and one Hanson, he obtained another special warrant to affect other vacancy, and finding that Samuel Chapman had also obtained another warrant of resurvey, it was agreed between Hanson, Chapman and himself, that the warrant obtained by Chapman should be executed instead of the one for the joint use and benefit of Hanson and himself, and that the costs of the survey should be paid by himself and Chapman; that this warrant was executed, and all the costs paid by himself, and the warrant was laid on lands entirely different from "Morris Landing," and the lands thus taken up by Chapman were called "Smithfield." That Chapman paid the caution money on "Morris Landing," not because he was interested therein, but because he, Morris, paid the whole cost of Smithfield. He denies that he ever sold, or offered to sell, either "Smithfield," or "Morris Landing," to Chapman; that said Chapman always admitted that "Morris Landing" was respondent's property, and rented the same for several years before his death from respondent, who had the exclusive possession thereof for several years after the survey and patent aforesaid,

and rented the same to sundry persons. He then denies that there was any agreement, parol or written, and insists "that if there was any agreement, it was not reduced to writing, and signed by the parties, as required in such cases by law," and also denies that the caution money was paid, or possession taken under any such agreement as is set up in the bill.

The testimony chiefly relied upon to sustain the allegations of the bill, was that of John G. Chapman, a son and heir at law of Samuel Chapman, and Elizabeth Chapman, the widow of said Samuel Chapman.

John G. Chapman proves, in substance, that he frequently heard both Samuel Chapman and the defendant, Morris, say, that the vacancy was discovered by Chapman, and at that time the adjoining land was owned by one of the Jenifer family. That Chapman told Morris of the vacancy, and the latter proposed to take it up in his own name, alleging that Jenifer had once interfered with him in relation to some land; that Chapman consented that the land should be taken up in Morris' name, and agreed with Morris that he should have one-half, and Chapman the other, and the land was taken up with that understanding and agreement; that the warrant was obtained in Morris' name, and the patent issued to him in virtue of the understanding between him and Chapman, that the land was to be held as their joint property. That witness has also been told both by said Chapman and Morris, that the former was to purchase the latter's half of "Morris Landing," provided he got the adjoining land, which had been owned by Jenifer, and sold to one Dunnington, and was to allow him the price he paid for Dunnington's land, \$8 *per acre*, and Dunnington's land was purchased by Chapman in 1821. That the land was always held by said Chapman, except a part of the shore, which was rented one year to a man from Virginia as a fishery, and for the rent of which suit was brought in Morris' name, because he and Chapman both having been present at the renting, it was agreed between them that Morris should receive the rent, as Chapman was a witness to the contract, but that Morris told witness the whole land then belonged to Chapman, who

was to credit him for his half thereof upon a settlement of their dealings. That said Chapman was in possession of the whole of this land up to the time of his death, in 1825, renting the same, and receiving the rent therefor; that Morris never claimed any part of it until after the division of Samuel Chapman's estate, in 1827, by which this land was allotted to the complainant, Etheldra, the wife of Harris.

Elizabeth Chapman proves that upon one occasion Morris came to her husband's residence, and had some conversation with him in reference to this land. That witness understood, from what passed between them, that Morris was to have one-half of the land for his trouble, and that her husband was to pay Morris for his half by giving him credit for it. This occurred long after the land was taken up. Her husband held possession of the land from the time it was taken up until his death in 1825.

The defendant objected to the testimony of both these witnesses, upon the ground of interest in the result of the suit, the former by reason of being one of the heirs at law of Samuel Chapman, and entitled to a moiety of his real estate; the latter as being the widow of the deceased, and entitled to dower in his real estate.

The division of the estate of said Chapman referred to in the proceedings, was effected by a deed of partition, executed on the 3d of October, 1832, between John G. Chapman and Harris and wife. This deed is to the purport following: after reciting that the parties, John G. Chapman and Etheldra Harris, hold, as tenants in common, in equal shares, the lands of which they are seized in fee as the heirs at law of Samuel Chapman, and that they have agreed to divide and hold their respective shares in severalty, it is thereupon covenanted, granted and agreed by and between them, that each shall hold, possess and enjoy in severalty the respective portion allotted by said partition, and which each of them, by the said deed of partition, doth grant, release and confirm to the other, with the *mutual* covenant and grant, that each party shall forever peaceably, quietly have, hold, occupy, &c., free and discharged

from all title, interest, claim and demand of the others, their heirs and assigns, &c.]

THE CHANCELLOR :

The bill in this case was filed in the year 1833, on the equity side of Charles County Court, and prays that the defendant may be compelled to convey to the complainants, Morgan Harris (since deceased) and his wife Etheldra, a parcel of land in said county, called "Morris Landing." After various proceedings in the County Court, it was transferred under the act of Assembly to this court, and is submitted for decision upon notes in writing of the solicitors of the parties.

The agreement alleged in the bill is, it is true a parol agreement, but a part performance of it, is distinctly averred, and a long possession of the party under whom the complainants claim is also charged.

The answer, however, denies the agreement, and impliedly, rather than expressly, relies upon the Statute of Frauds.

My opinion is, that the complainant's case is clearly established by the proof, if John G. Chapman and Elizabeth Chapman are competent witnesses, and I do not see how they can be considered incompetent. John G. Chapman and the surviving complainant were the heirs at law of the late Samuel Chapman, and after his death, by their deed making partition of the estate, executed on the 3d of October, 1832. Each conveyed to the other certain parcels thereof, to be held in severalty with a covenant that each should hold the parcels so conveyed free from any claim or demand on the part of the other, or his or her heirs, but neither covenanted to assure the title of the other.

In this division the land in question fell to the share of the complainant, and it is supposed that if she fails in this suit, there is some sort of responsibility on the part of the witness to compensate her for the loss, and that, therefore, he is disqualified on the ground of interest. But I do not think so. A vendor of land, selling in good faith, is not responsible for the goodness of his title beyond the covenants in his deed. *Gouver-*

neur vs. *Elmendorf*, 5 *Johns. Ch. Rep.*, 79. And as there can be no doubt of the good faith of the witness, and he has not by his covenant warranted the title, except as against himself and his heirs, I think him a competent witness. As to Mrs. Elizabeth Chapman, no disqualifying interest is shown in her. But conceding that she is not competent, (though I certainly think she is,) the very full and conclusive evidence of John G. Chapman, together with the other circumstances of the case is, in my opinion, quite sufficient to entitle the complainant to a decree.

As there seems to be some doubt whether the purchase money was paid, a decree will be signed for a specific performance of the agreement on payment of the purchase money, or on its being made to appear by satisfactory evidence that it has been paid.

[The decree of the Chancellor in this case was affirmed upon appeal. See 9 *Gill*, 19.]

ALEXANDER, for Complainants.

MAY and ROBT. J. BRENT, for Defendant.

JONATHAN WILSON

vs.

JACOB MARKLE.

} LAND OFFICE, 8TH OF FEBRUARY, 1851.

[PRACTICE IN THE LAND OFFICE.]

It is the settled rule of the land office, that a patent will not be granted for lands taken up under a warrant of resurvey, which are not contiguous. A party has the right to abandon the land which was not liable to be taken up under his warrant, and have the survey corrected to this extent, but he cannot at the same time keep open the question whether a correction is necessary at all.

[A certificate for "Conway," being a survey returned upon an escheat warrant to affect certain soldier's lots in Alleghany

county, taken out by Jonathan Wilson was *caveated* by James Condy and Jacob Markle. 1st, because the lots named in the survey as contiguous are in fact separate and distinct; 2d, because the certificate of survey attempts, contrary to law and practice, to connect lots which are separate by intervening vacancy, and thereby make them contiguous; 3d, because the plat and certificate by failing to gratify the calls of the original patents of these lots create vacancies where in fact none existed; and, 4th, because the certificate includes land already granted. A certificate for "Summit Point," owned by Markle, was caveated by Wilson, as was also a certificate for "Sacramento." Upon these several caveats the Chancellor delivered the following opinion.]

THE CHANCELLOR:

It seems to be the undisputed law of the land office, that a patent will not be granted for lands taken up under a warrant of resurvey which are not contiguous. And with regard to the certificate of "Conway," it is quite apparent, that the necessary contiguity has been effected by shortening the lines of some of the original lots. This abridging the lines is not denied, but it is attributed to the mistake of the surveyor and the suggestion is made that if the certificate is sent back for the purpose of correction and the lines are extended to their full length, vacancies will still be found, and the required contiguity shown to exist.

It is also suggested on the part of Mr. Wilson, that he is entitled to abandon a portion of the lots comprehended in his survey and take a patent for such as are contiguous.

This right to abandon that which was not liable to be taken up under his warrant, and take the lands which were liable, can scarcely be disputed. *Hoffman vs. Walker, Landholders' Assistant*, 420. But then not content with this, the same party asks that another question may be kept open and undecided affecting the rights of other parties, for the purpose of ascertaining whether the surveyor did not make the mistake which has been imputed to him.

The Chancellor does not think that upon a mere suggestion of error like this he would be justified in suspending the decision of a question affecting the rights of other parties, who, having complied with the regulations of the land office, ask to have their titles perfected.

The right of Mr. Wilson to have his certificate corrected, so as to throw out the land to which he is not entitled, and take that to which he is, and which at the time of his survey, or of his warrant, (in case the title commences with the warrant,) had not been located by the warrant of another party is one thing. But his right to have this done, and also to keep open the question whether a correction is necessary, is another and a very different thing.

If Mr. Wilson, conceding he has concluded in his survey, land which was not subject to his warrant, asks to have it corrected, this may be done, and he will be entitled to a patent for the land which his warrant did reach, provided some other person had not acquired a previous title thereto, according to the laws of the land office. But when a party asks for a correction he must be understood as admitting that there is something to correct. He cannot be allowed when making such an application to say, if you will give me an opportunity I will show that there is no necessity for a correction at all. The right rests upon a conceded error and can only be claimed upon that concession.

My opinion, therefore, is, that the *caveats* to "Conway," must be ruled good, and if the defendant thinks proper, he may have an order correcting his certificate to the effect and for the purpose before mentioned.

These views are believed to be in accordance with the case of *Hoffman vs. Walker*, already referred to, and that of *Issacher & Schofield vs. Beall*, *Landholders' Assistant*, pp. 420, 421.

I do not find any thing urged by the caveator, or in fact, among the proceedings, any objection to the certificate for "Sacramento," and, therefore, that *caveat* must be overruled.

With regard to the certificate for "Summit Point," the objection rests upon the allegation that it includes Lot No. 1168,

which, as contended, has already been patented to Templeman and Stewart, in the tract called "Harrison." But upon a careful examination of the certificate of "Harrison," I do not find that it embraces Lot No. 1168, and, therefore, the objection being founded upon a mistake in point of fact, of course must fail.

The *caveat* of the certificate for "Amber," which includes Lot No. 1165, is not now for hearing, and, therefore, no opinion will be expressed with regard to it.

It is, thereupon, ordered that the *caveats* to the certificate for "Conway," be, and the same are hereby ruled good, and that those to the certificates for "Sacramento," and "Summit Point," be, and the same are hereby overruled, and that the costs in each case to be taxed by the Register, be paid by the party against whom the order is made.

F. A. SCHLEY and FRANK H. STOCKETT, for Condry & Markle.
WM. PRICE, for Wilson.

THOMAS ALLEIN ADM'R OF RICHARD G. HUTTON AND OTHERS, <div style="text-align: center; font-size: small;">vs.</div> JOSEPH G. HUTTON AND OTHERS.	}	DECEMBER TERM, 1841.
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[SALE OF MANUMITTED NEGROES TO PAY DEBTS.]

WHERE negro slaves are manumitted by deed or will, and the real and personal estate of the manumittor or testator are insufficient for the payment of his debts, his creditors may file a bill in equity making the manumitted slaves and all persons interested parties, and have an account taken of all the property of the deceased, and if it shall prove insufficient to pay his debts, the manumitted slaves may be decreed to be sold for that purpose, either for life or a term of years, as the circumstances or the nature of the case may require.

Richard G. Hutton, of Anne Arundel county, by a deed of manumission, executed on the 9th of November, 1819, manumitted sundry negro slaves after a term of years, to wit: "George, aged twenty-five, to be free on the 1st of January,

1827; James, aged twenty-three, to be free on the 1st of January, 1827; Little James, aged twenty, to be free on the 1st of January, 1828; William, aged one year, to be free on the 1st of March, 1840; woman Nancy, aged nineteen, to be free on the 1st of January, 1827, and all the increase of the said Nancy born during the time of her servitude to serve, if males, twenty-one years, and if females, eighteen years. Woman Minta, aged seventeen, to be free on the 1st of January, 1824, and all the increase of the said Minta born during the time of her servitude, to serve, if males, to the age of twenty-one years, and if females, eighteen years, and the increase of the above women, born after their term of servitude is expired, to be free to their latest generations."

Hutton died in 1832, and on the 25th of October, 1833, negro Jim Sharp, one of the negroes manumitted by the above instrument, filed his petition for freedom in Anne Arundel County Court, against Thomas Allein, the administrator of Hutton, who had taken possession of him, and returned him in the inventory as a part of Hutton's estate. The right of the petitioner to his freedom was resisted by the administrator, on the ground that Hutton, at and before the period of the execution of the said deed of manumission, was in insolvent circumstances, being indebted to an amount exceeding the value of all his property of every description, including the negroes manumitted by said deed, and that the same was fraudulent as to the creditors of said Hutton.

This case was brought before the Court of Appeals upon appeal by the administrator, and that court, at its June term, 1835, decided that in the suit for the petition for freedom, "the question whether the estate of the deceased was sufficient to pay his debts, could not be legally decided, so as to deprive the petitioner of his right to freedom, and that the proper remedy in such a case is by a bill in equity where the manumitted slaves and all proper parties can be brought before the court, and where an account may be taken of all the property of the deceased, both real and personal, and if that should be found inadequate to the payment of his debts, the manumitted slaves

may be decreed to be sold for that purpose, either for life or for a term of years, as circumstances or the nature of the case might require." See *Allein vs. Sharp*, 7 *Gill & Johns.*, 96 to 108.

On the 15th of November, 1836, Allein, the administrator, and several of the creditors of Hutton, for themselves and all others who should come in and contribute to the costs of suit, accordingly filed their bill in equity, alleging that Hutton, at the time of the execution of said deed of manumission, was largely indebted to divers persons; that said debts exceeded the value of all his property of every description, and that he continued insolvent and embarrassed in his affairs from that time till his death. That Hutton remained in possession of the negroes manumitted by said deed and their increase till his death. That he executed said deed with a view of prejudicing, defeating, delaying and defrauding his creditors, and with a view of securing to himself a valuable interest in the services of said negroes for a period, as he then supposed, commensurate with his own life, and that the same is fraudulent and void as against the creditors of said Hutton. That after Hutton's death, his administrator, Allein, took possession of said negroes as part of his personal estate, and included them in the inventory, which he returned to the Orphans Court. The bill then states the petition for freedom and the decision of the Court of Appeals, and insists that this court will charge the said negroes with the payment of the debts of the said Hutton by extending their term of servitude, or, if necessary, by selling them as slaves for life.

The bill then makes the infant children and heirs at law of said Hutton, and the manumitted negroes parties defendants, and calls upon them to disclose the names and ages of the issue of the said manumitted negro women, Nancy and Minta, and prays that such issue, if any, may be made defendants, and that a decree may be passed vacating said deed of manumission as in prejudice of creditors, and charging the said negroes with the debts of said Hutton, and that for this purpose a sale of said negroes, either for a term of years or for life may be directed by said decree, and for general relief.

The infant heirs at law of Hutton, answered by their guardian, *ad litem*, that they knew nothing of the matters charged in the bill, and did not admit the truth thereof. The negroes not having answered, a decree, *pro confesso*, as to them, was passed, and a commission issued to take testimony, under which the allegations of the bill were fully proved.

An order was then passed, directing the defendants to account with the plaintiffs of, and concerning the real and personal estate of the said Hutton, deceased, referring the cause to the Auditor to state such account, and to make a statement of the debts of the said Hutton, upon due notice to the creditors to file their claims. In obedience to this order, the Auditor, on the 6th of December, 1841, filed his report and statement of claims, by which it appeared, that the debts due by the deceased amounted to \$9421 79, that no account of his personal estate was rendered by the administrator, it appearing from the testimony that none came to his hands, the whole having been absorbed by executions binding thereupon.

The Chancellor, (*Bland*,) thereupon, on the 21st of December, 1841, passed a decree, by which it was "adjudged, ordered and decreed, that the Auditor's statement, lately reported in this cause, be, and the same is hereby ratified and confirmed, and that the defendants, Jim Sharp, Jim Ennis, Nancy, George, Minta, Lloyd, Samuel, Admirilla, William and Wilson, together with the increase, if any, of the said Nancy, Minta and Admirilla, be sold for the purpose of satisfying the claims of the complainants as aforesaid." The decree then appoints a trustee to make the "sale of the said negroes for life," upon giving the usual notice. The terms of sale being for cash, or on a credit upon such terms as may be deemed by the trustee most advantageous for all concerned, the sale to be made publicly or privately, as the trustee may deem most advisable.

Under this decree the negroes were sold, and the sale was confirmed by the Chancellor.

A. RANDALL and THOS. S. ALEXANDER, for the Complainants.
N. BREWER and J. JOHNSON, for Defendants.

JAMES TWIGG
 vs.
 GABRIEL JACOBS.

} LAND OFFICE, 16TH OF SEPTEMBER, 1847.

[WARRANTS OF RESURVEY.]

THE right to a warrant of resurvey, only appertains to a party who has a fee simple interest in the original tract purpose to be resurveyed, and by parting with the title to such tract subsequent to the date of the warrant, the latter loses its effect as a warrant of resurvey.

A warrant of resurvey may operate as a common warrant, and affect any vacant land which a common warrant could affect.

The state will never knowingly grant the same land a second time.

[In this case, a warrant of resurvey upon a tract of land called *Fat Bacon* was issued on the 9th of September, 1776. To the certificate of the surveyor, returned on the 1st of November, 1797, a *caveat* was filed by James Twigg on the 5th of April, 1847, for the reasons appearing from the following opinion of the Chancellor.]

THE CHANCELLOR:

It appears, in this case, that Gabriel Jacobs, by whom the warrant of resurvey was taken out on the 9th of September, 1796, subsequently, that is, on the 27th of October, 1819, sold and conveyed the original tract, called "Fat Bacon," to one Lenox Martin, from whom, by sundry mesne conveyances the title in said original tract has devolved upon the caveator, James Twigg. This transfer of the title to the original tract, would, it is supposed, take from the warrant the character and effect of a warrant of resurvey, as the right to such a warrant only appertains to him who has a fee simple interest in the original tract proposed to be resurveyed, and I am of opinion, that by parting with the title in the original, subsequent to the date of the warrant, the latter loses its effect as a warrant of resurvey. But the general court decided, in *Hammond vs. Norris*, 2 Har. & Johns., 141, that a warrant of resurvey may operate as a common warrant, and affect any vacant land

which a common warrant could affect, and the warrant in this case may, therefore, be regarded as possessing the qualities of a common warrant. In this view, the holder of this warrant might be entitled to a patent for the land included in this survey, but that it appears by the plat returned under the order of the 19th of June last, that nearly all the land included in his survey has been previously granted, and as the state will never knowingly grant the same land a second time, the *caveat* filed in this case must be ruled good.

THOS. S. ALEXANDER, for the Caveator.

NELSON BAKER AND
GEORGE SMITH
vs.
HENRY NAYLOR.

} LAND OFFICE, 18TH OF JANUARY, 1851.

[PRACTICE IN THE LAND OFFICE.]

A CERTIFICATE of survey embraced several lots contiguous to each other, but upon a caveat it was admitted, that two of these lots belonged to another party, by the intervention of which, the contiguity of the others was destroyed. HELD—That the certificate may be corrected, so as to exclude from the survey certain lots separated from the others by this intervention.

[A certificate of survey granted to Henry Naylor, upon an escheat warrant, embraced seven contiguous soldiers lots in Alleghany county, numbered 1121, 1122, 1131, 1132, 1134, 1920 and 1923, and was caveated by Baker & Smith. It was admitted that Smith had title to lots 1132 and 1923, at the time of the issuing of the warrant, and that these two lots destroyed the contiguity of the others. Naylor then asked leave to have his certificate amended, so as to embrace lots 1121, 1122 and 1131. Upon this question the Chancellor delivered the following opinion and order.]

THE CHANCELLOR:

In this case it is manifest and is conceded, that the *caveat* of

Smith must be ruled good, and the only question is, whether, according to the rules and practice of the land office, Naylor may not have his certificate corrected by excluding lots numbered 1134 and 1920, which by the intervention of Smith's lots are separated from the other lots comprehended in the certificate of the former.

This question appears to me, to be conclusively settled by the case of *Issachar & Schoffield vs. Beall*, reported in the *Landholders' Assistant*, 420, 421. Indeed if that case and this are distinguishable at all, it is in circumstances which make this case stronger in favor of the right to have the correction made, and, therefore, I shall pass an order accordingly.

It is, thereupon, adjudged and ordered, that the *caveat* of George Smith be, and the same is hereby ruled good, and that the certificate of "Naylorsville" be corrected by excluding lots numbered 1132, 1923, 1134 and 1920. And that the surveyor of Alleghany county make the said correction and return the corrected certificate along with the original to this office.

THOS. PERRY, for the Caveators.

GEO. A. PEARRE, for the Caveatee.

JAMES MADDOX AND OTHERS	}	MARCH TERM, 1848.
VS.		
HENRY H. DENT EXC'R OF JAMES BRAWNER AND OTHERS.		

[DUTIES AND RESPONSIBILITIES OF TRUSTEES—PRACTICE IN CHANCERY.]

A TRUSTEE or his administrator may be called upon *by petition* to bring the trust fund into court, and to account therefor; and the administrator may also be required in such proceeding, to account for the personal estate of the trustee.

A trustee was appointed to sell the real estate of a deceased party, for the payment of his debts in 1830, and made and reported the sale which was affirmed, *nisi*, in 1831, and in 1842 he was called upon by the heirs at law of the deceased to account for the purchase money. **HELD**—That after this

lapse of time the trustee must not only be presumed to have received the purchase money, but is responsible for it whether he received it or not.

Upon a creditor's bill, the claim of the complainant creditor as stated in his bill, is ascertained and established by the decree.

Real estate was directed by a will to be sold by the executor for the benefit of all parties interested in the estate, which was accordingly sold by the executor under the act of 1831, ch. 315, sec. 10. **HELD**—That the proceeds of such estate is to be treated as a portion of the personal assets, and is liable for the debts of the testator.

[The facts of this case are fully stated in the following opinion of the *Honorable Nicholas Brewer*, Associate Judge of the Third Judicial District, to whom the cause was certified by the Chancellor, he having been the counsel for one of the parties thereto.]

OPINION BY JUDGE BREWER:

This cause having been referred to me by certificate of his honor, the Chancellor, of the 19th of January, 1845, was argued by counsel on the part of the defendants, petitioners, and Henry H. Dent, executor of James Brawner, on the petition of Isaac Maddox's heirs, and on exceptions to the report of the Auditor of the Chancery Court.

A decree passed in Charles County Court for the sale of the real estate of Isaac Maddox, November 26th, 1830, for the payment of his debts, and James Brawner was appointed trustee, who made and reported the sale November 30th, 1831, which was duly confirmed, it is presumed, although no final order of ratification is found among the papers.

No account was passed distributing the proceeds, and on the 30th of November, 1834, the heirs, who were infants when the decree passed, filed their petition, praying that the purchase money might be brought into court, upon which an order, *nisi*, was passed to bring it in, but subsequently, on the 14th of June, 1843, and the 18th of June, 1844, orders were passed referring the cause to the Auditor, who reported two accounts, A. and B., and on the 15th of August, 1844, account C., charging the trustee with the proceeds of sale, and distributing them among creditors. To these reports and accounts objections were filed

on the 20th of October, 1844, because certain claims therein mentioned were paid by Henry Brawner, executor of Maddox, not by the trustee, and were not legally proved, and one claim was not legally proved, nor a proper claim against the estate.

In this state of the case, it was transferred to this court on the 18th of December, 1845, and on the 23d of January, 1846, the Chancellor passed an order referring the case to the Auditor of this court, with directions to state a final account, from which he will exclude all claims against which the Statute of Limitations has been relied on, and which appear to be barred, and also all claims which have not been sufficiently authenticated. In pursuance of this order, the Auditor made his report on the 27th of February, filed 4th of March, 1846, allowing expenses and complainant's claim, and distributing the residue between the heirs, but recommending a suspension of the final order until some evidence should be furnished of the widow's claim in lieu of dower, she having agreed by answer to accept the same, and also submitting whether complainant's claim could be allowed.

After the filing of this account, James Brawner died, and his death was suggested on the 17th of July, 1846, and another petition was filed by the heirs, stating the death of the trustee, and that H. W. Dent was his executor, and praying that he might be made a party to the suit, upon which the Chancellor passed an order on the 18th of the same month, that the said Dent bring into court all sums of money which may have come into his hands, or into the hands of his testator, by virtue of the trust, or show cause to the contrary.

The claim of the widow ought to be no obstruction now to the final adjudication of this case. She was a party to the suit consenting that the land should be sold clear of dower, and it was her province to present proof by which the amount of her allowance might be ascertained, and she has had ample time, both before and since the Auditor's report, to do so, and having neglected it, the case cannot be retarded further on that account. The complainant's claim, as stated in the bill, is ascertained by the decree, and cannot now be disputed. The

other claims are all objected to for want of proof, and are not legally proved. The Statute of Limitations is also relied on against them, and is a bar, and there seems to be no objection to a confirmation of the Auditor's report and accounts.

But since the statement of the account, the trustee has died, and the administrator is brought into court on a petition, and required to bring into court the purchase money received by the trustee or by himself. There would be no difficulty in ordering the trustee to do so were he alive, nor in requiring the same of the executor if he admitted, or it was proved that he had received it, or that it was in his possession as administrator sufficiently identified, or that he had sufficient assets of the testator in his hands. There is neither allegation, admission or proof of the first two, nor as it appears to me, of the last. There is certainly no allegation in the petition that the executor has sufficient assets, nor is there any proof taken in reference to them.

The executor, by his answer, denies that he has any cash assets whatever, and does not admit that he has any other, or to what amount. It is, therefore, this 20th day of June, 1848, adjudged and ordered, that the Auditor's report and account, filed March 4th, 1846, be, and the same is hereby ratified and confirmed, and the petitioner has leave to amend his petition if he think proper, so as to make a sufficient case against the executor, and establish it by proof, or his petition must be dismissed.

[In pursuance of this order, the heirs at law amended their petition against Dent, the executor of the deceased trustee, Brawner, charging that Brawner left assets which have come to the hands of said Dent, as executor, greatly more than sufficient to pay all the debts and liabilities of every kind due by Brawner; that Dent, as such executor, has sold large amounts of property, and received large sums of money for the same, which he now has in his hands, and that he has cash and other assets more than sufficient to meet the petitioners' claims due by said Brawner, but all other claims against him. The peti-

tion then prays for an account of such assets, and for general relief.

The answer of Dent to this amended petition denies that he has ever received any part of the trust fund, and alleges his belief that Brawner fully accounted, as trustee, for every cent of the funds which came to his hands, to the creditors entitled thereto, and insists that the lapse of time which has occurred since the sale made by him as trustee, is a full and sufficient defence against any claim on account of the purchase money. That Maddox, at the time of his death, was notoriously insolvent, and that the claim of his heirs against the estate of Brawner is unjust and unconscionable. The answer then further objects that the executor is not properly accountable in this form of proceeding. He denies that he has received assets sufficient to pay Brawner's debts, and insists that said Brawner is largely insolvent. He then proceeds to give an account of his proceedings as executor, and refers to his accounts passed in the Orphans Court as evidence thereof. By an amended answer subsequently filed, Dent, as executor, exhibits the will of James Brawner, by which certain real estate was devised to Dent, or the proceeds of the sale thereof, in trust for the use of the testator's wife, for life, and after her death to his son and grandson, equally, and the said Dent, as executor, was given, by the will, full power to sell and dispose, invest and reinvest any and all parts of his estate, real, personal and mixed, in such manner as he may deem for the benefit of the estate, and the testator's wife, sons, and grandson, and all others interested therein. The amended answer then states that he has sold the real estate devised for the benefit of the testator's wife, for life, and has received \$1800, one-half of the purchase money, and insists that he has charge of this as trustee for the devisees named in said will, and not as executor, and therefore, he insists that to affect this fund, the said devisees ought to be made parties, and unless they are so made parties, the fund ought not to be interfered with in any way by this court, and even if they were made parties, the court would not be competent in this form of proceeding to affect the same

in any way. Upon these answers, and exhibits filed therewith, the Judge delivered the following opinion.]

OPINION BY JUDGE BREWER :

Since the order of the 20th of June, 1848, the petition of the heirs of Isaac Maddox has been, in part, amended, in pursuance of that order, an answer and amended answer of Henry W. Dent, executor of James Brawner, filed thereto, some testimony taken, and the case again argued.

The first objection of the defendant is to the form of the proceeding. They say that the petitioners should have filed an original bill, and that the executor of James Brawner cannot be made to account for the assets of the deceased on a mere petition, because it would be necessary to call in all the creditors by notice, and settle the whole estate. In 3 *Bland's Ch. Rep.*, 284, the Chancellor says, on a similar petition, that the trustee may be ordered to bring the money into court, and so may his administrator, if he have received any part of the purchase money, and also may be required to account. And there is no reason why he should not. The parties interested cannot well ascertain who has received the purchase money, or what part, or how it has been applied, without calling upon the administrator, who has all the trustee's papers. The power to bring him in for that purpose is admitted, and as he may have nothing of that fund in his hands, and may have assets, it is a very convenient practice to frame the petition with that aspect also, that if the petitioner cannot lay hold of that fund he may in the same proceeding recover his claim from the general assets of the trustee, in case he has received and misapplied it. The defendant answers on oath, and the same effect is given to his answer as if it were to a bill. Testimony may be taken as conveniently, notice given to creditors, and the whole estate administered as well as on an original bill.

Another objection is, "that there is neither allegation or proof that the trustee ever received the purchase money." There is certainly no allegation to that effect in any of the petitions filed. The petitioners, defendants and the court, all seem to have

taken that for granted. The petitioners pray that the trustee may bring in the purchase money. The court passes an order that first the trustee and then the executor shall bring in the purchase money, or show cause to the contrary, and the executor in answer contends, not that the money was never received, but that the trustee had paid it away to the creditors, and that is the whole ground of defence as to the trustee. Testimony has been taken to sustain it, and in truth, the trustee must after this lapse of time not only be presumed to have received it, but is responsible for it, whether he has received it or not. The purchaser's bond and his own have long been subject to the plea of limitations, and he has neither brought the purchaser's bond into court nor communicated to the court any difficulty in the recovery of the amount. 1 *Bland*, 410. It is also too late now, at the hearing of the cause, to make such an objection. There is neither allegation nor proof that the executor ever received any part of the purchase money from the purchaser, or holds it as a distinct fund in his testator's estate, and as the claim of the petitioners could only be a lien upon such a fund, they can only, therefore, come in among the general creditors of James Brawner's personal estate, of which an account will be ordered.

The next question is, whether the purchase money of James Brawner's land, the sale of which was ratified by the Orphans Court, is to come in as a part of the personal estate. It seems to me, however, hardly to be a question. The will of James Brawner gives to his executor the power to sell and dispose of, and invest, and reinvest, any, and all parts of his estate, real, personal and mixed, in such way and manner as he may deem for the benefit of his estate and the interest of his said wife, sons and grandsons, and all others who may become interested in his estate. It is superfluous to ask whether his creditors are not so interested.

The executor has sold the land in question, and the sale has been reported to, and ratified by the Orphans Court, under the act of 1831, ch. 315, sec. 10, and by the same section, he is bound to account therefor to the Orphans Court, in the same

manner as for the sales of the personal estate, and by the 11th section, his bond is made answerable therefor. The executor is as much bound to account for this fund in this court as in the Orphans Court, and it being treated as personal property, it is not necessary to make the heirs parties to this proceeding. The widow, however, is not to be deprived of her rights. She is to be treated as a purchaser for valuable consideration of the devise to her, and is to receive the interest of the whole residue of the purchase money after the payment of debts, for her life, or if she prefer it, a gross sum in lieu thereof, which may not exceed the value of her dower, the latter to be paid to her in preference to the claims of creditors.

[From the order passed in pursuance of the above opinion, the defendants appealed, and so far as the views stated in said opinion are concerned, the order was affirmed by the Court of Appeals, at its December term, 1853. See 4 *Md. Rp.*, 522.]

NICHOLAS BREWER, of JNO., for Complainants.

CORNELIUS MCLEAN, for Defendants.

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See CONSTRUCTION OF ACTS AND STATUTES.

ADEMPTION OF LEGACIES.

See WILL AND TESTAMENT, 6.

ADMINISTRATION.

See AGREEMENTS, &c., 4, 5.

AGREEMENTS, CONSTRUCTION OF, &c.

1. A purchase of land containing 181 acres, more or less, at so much per acre, was made in 1841, and at the same time the vendor agreed in writing to make deduction out of the purchase money for so much of the land sold, "where peaceable possession could not be given." The vendor, subsequently executed a deed to the vendee for the land, describing it by metes and bounds, course and distance, and as contain-

AGREEMENTS, CONSTRUCTION OF, &c.—*Continued.*

ing 181 acres, more or less, and put the latter in possession of the whole. This deed contained no covenants. **HELD—**

That the stipulation on the part of the vendor was fully discharged by putting the vendee in possession of the land, and the latter could not claim an abatement of the purchase money for a part of this land, of which he, *subsequently*, permitted himself to be dispossessed. *Smith vs. Chaney*, 246.

2. The deed being subsequent in date to the contract for an allowance in case of deficiency, must be considered as taking the place of all previous agreements on the subject, and as containing the full and entire contract of the parties. *Ib.*
3. A vendor selling in good faith is not responsible for the goodness of his title beyond the extent of the covenants in his deed. *Ib.*, and *Harris vs. Morris*, 529.
4. Agreements transferring the right to administer upon an estate to a third party, in consideration of receiving from such party the commissions, are against the policy of the law. *Brown vs. Stewart*, 368.
5. But an agreement between two parties, both equally entitled, that a joint administration shall be taken out, and that as the principal labor and responsibility was to be borne by one, the other would be content with such portions of the commissions as his associate should think he deserved, is valid. *Ib.*
6. Where there are two executors, both are equally entitled to commissions, and, in the absence of any express agreement, neither can deprive the other of his share, upon the ground that the party claiming the whole has performed the entire labor of settling up the estate, but by *an agreement, inter sese*, they may provide for an unequal division of the commissions, or that one shall have the whole. *Ib.*

ALIMONY.

1. Where a separation was commenced and is continued by the act of the husband against the will of the wife, and he refuses or neglects to make provision for her support, the Court of Chancery in this state, has the power, and will decree her alimony, though there has been no divorce decreed and though the case made by the bill and proof would not, according to the ecclesiastical courts in England, entitle her to a divorce *a mensa et thoro*. *Jamison vs. Jamison*.
2. In England, alimony is granted only as a consequence or an incident, to a sentence of divorce, *a mensa et thoro*, and no such allowance will be made by the Chancery Court there until such decree of divorce has been passed. *Ib.*
3. Though in this state the Court of Chancery had no power to decree a divorce prior to the act of 1841, ch 262, yet it had from a period prior to the revolution, full and complete jurisdiction in cases of alimony, and could, upon a proper case, decree the wife a separate maintenance out of the estate of the husband. *Ib.*
4. In England, on an application for a divorce on account of cruelty, it is necessary to show that actual violence has been committed, attended with danger, or a reasonable apprehension of such violence. *Ib.*

ALIMONY—*Continued.*

5. The act of 1777, ch. 12, sec. 14, conferring jurisdiction upon the Chancellor in cases for alimony, gives full and complete jurisdiction over the subject, and does not restrict the court in making such allowance to the circumstances and causes which would entitle the party to a divorce according to the ecclesiastical laws of England. *Ib.*
6. There is no tribunal in this state competent to entertain a suit for the restoration of conjugal rights. *Ib.*
7. Prior to the act of 1841, ch. 262, the legislature had the exclusive power of granting divorces, and they exercised it as a regular exertion of legislative power. *Ib.*
8. There must be some method by which the husband may be compelled to maintain his wife, and when restitution of conjugal rights cannot be decreed, alimony must. *Ib.*
9. The amount of the allowance is to be determined by the value of the estate of the husband, and if the proof is not sufficiently clear to enable the Chancellor to determine such value satisfactorily, the question will be referred to the Auditor. *Ib.*

ANNUITY.

See WILL AND TESTAMENT, 1, 15.

ANSWER.

See INSOLVENT DEBTOR, 2.

PRACTICE IN CHANCERY, 42.

ANTEDATING OF NOTES.

See EVIDENCE, 4.

ANTENUPTIAL SETTLEMENT.

1. To establish, in opposition to the plea of the statute of frauds, an antenuptial agreement between the parents of the parties about to be married, that one was to furnish land, and the other personal property, to start the married couple in life, the proof must be clear and positive of a contract certain and concluded. *Stoddert vs. Bowie*, 475.
2. Where acts of part performance are relied on to establish such an agreement, they should be such as in themselves, not only show that there has been an agreement, but also throw light upon the nature of that agreement; if the acts performed are equivocal acts, they will afford no proof of an agreement. *Ib.*

APPEAL.

1. After an appeal is taken and an appeal bond executed and approved, no step in the cause can be taken which by any possible contingency can prejudice the appellant. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
2. An order distributing a fund among a certain class of creditors and excluding others, was appealed from by one of the parties whose claim had been admitted to a dividend, but those excluded did not appeal.
HELD—

That after such appeal taken and bond given, the court cannot order the dividend allowed to one of the creditors not appealing to be paid to him. *Ib.*

APPEAL—*Continued.*

3. The court has the power to direct a fund in court to be invested pending an appeal, notwithstanding some of the parties interested in the fund may refuse their assent to such investment. *Ib.*

See PRACTICE IN CHANCERY, 15.

CONTRACT, 1.

APPORTIONMENT OF RENT.

See SALES BY TRUSTEES, 6.

ARBITRATION AWARD.

1. By arbitration bonds executed in 1846 between complainant and the executor of G. C., it was recited, that complainant, in right of his wife, claimed to be entitled to certain portions of the estates "of the father, aunt, and other relations and ancestors" of the mother of his wife, which had come to the hands of said executor, and that the parties had mutually agreed to refer "all the *differences* between and among them, and *all said claims* as aforesaid" to arbitrators, "in order to avoid litigation," &c. A settlement had been made in 1836, between complainant and G. C., in his lifetime, in reference to the *paternal* succession of complainant's wife, which was *consummated by deeds* and other writings, and had ever since been *acquiesced in* and regarded by all parties as *final*. HELD—

That as there might have been, or the parties to the arbitration might have supposed there was, some portion of the *paternal* succession which had come to the hands of the executor, besides that embraced in the settlement of 1836, the arbitrators transcended their power in disturbing that settlement. *Carter vs. Calvert*, 199.

2. The award found a certain sum due by G. C. at his death to complainant, and that "payments to a considerable amount had been made by" the executor "on account thereof" since the death of said G. C., "for which he is entitled to credit thereon," and then awarded "that a fair account be taken between the parties of the balance due, if any," without stating by whom the account was to be taken, or within what time, or upon what principles. HELD—

That the award was void because it did not make a final determination of all the matters submitted. *Ib.*

3. The reservation of a future power by the arbitrators in their award, if it affect the whole of the award, will render it totally void, because the award itself should close up all matters submitted. *Ib.*
4. But the reservation of a mere ministerial act, such as an arithmetical calculation, and not a judicial question, will not have the effect to vitiate the award. *Ib.*

ASSIGNMENT.

1. A debtor residing in San Francisco sent, by letter, to his agent in Baltimore, two drafts on New York and one on Baltimore, with request to collect them, and pay the proceeds to certain creditors specified in the letter, with the respective sums due each, and also gave those creditors orders on his agent for the sums due them. One of these orders was payable out of the proceeds of the New York drafts, the others

ASSIGNMENT—*Continued.*

out of both the New York and Baltimore drafts, but none of them were accepted by the agent. The Baltimore draft being dishonored, the holder of the order on the New York drafts claimed the payment of it in full out of the proceeds thereof to the exclusion of the others.

HELD—

That the proceeds of the New York drafts should be paid, *pro rata*, among all the creditors mentioned in the letters. *Gibson vs. Finley*, 75.

2. It is the invariable effort of a court of equity to do equal justice to all by a ratable distribution of the fund under its control, when not prevented from so doing by the plain and explicit terms of the instrument with which it has to deal. *Ib.*
3. Where an order is drawn for the *whole* of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee, it binds the funds in his hands. *Ib.*
4. But where the order is drawn, either on a general or particular fund, *for a part* only, it does not amount to an assignment of that part, or give a lien as against the drawee, unless he assent to the appropriation by an acceptance of the draft, or an obligation to accept may be fairly implied from the custom of trade in the course of business between the parties, as a part of their contract. *Ib.*
5. A suit in this court for the recovery of a sum of money was in October, 1835, for a valuable consideration assigned by the plaintiffs, and the assignee had the case entered for his use upon the docket of the Court of Appeals, where it was then pending upon appeal, and in January, 1836, had the same cause marked for his use upon the docket of this court. The cause being subsequently remanded for amendment and further proof, an amended bill was filed in 1838, when the entry for the use was not marked upon the docket, and has not been since.

HELD—

That this assignee was not guilty of laches or neglect, and is entitled to the proceeds of the suit in preference to a party who received an assignment of the same in 1841 or 1845, to secure a pre-existing indebtedness. *Gill vs. Clagett*, 153.

6. A party who has obtained the assignment of a suit or decree, has done all which can be reasonably required of him when he has caused the entry to his use to be made; he is not bound to see that the entry to his use is duly copied whenever the cause is transferred from docket to docket. *Ib.*
7. A promise to pay a creditor out of the fruits of a pending action, and a promise to assign the action to him are very different things; in the former case credit is given to the party making the promise; in the latter, a *specific security* is looked to. *Ib.*

See VENDOR'S LIEN, 2.
LIEN, 2.

ASSIGNMENTS IN FAVOR OF CREDITORS.

ASSIGNMENT OF A SUIT.

See ASSIGNMENT, 5, 6, 7.

ASSIGNMENTS IN FAVOR OF CREDITORS.

1. An assignment in favor of creditors, though in other respects free from objection, must convey all the property of the grantor, and the *onus*, in this regard, is upon the party who sets up the deed. *Keighler vs. Nicholson*, 86.
2. A deed in favor of creditors, of specific articles of property, and which does not, by express terms, purport to convey all the property of the grantor, is not, on *that account*, absolutely void, but upon proof that the grantor had no other property, will stand, if its other provisions are legal. *Ib.*
3. The adjudicated cases in this state have not decided that an assignment in favor of creditors, which provides that the dividends of the non-assenting shall be divided proportionably among the assenting creditors is void. *Ib.*
4. It would be irregular to decide upon the validity of such a deed upon the return of a writ of sequestration to enforce a decree when no such question was presented in the case in which the decree was obtained. *Ib.*

ATTACHMENT.

1. Money in the hands of a trustee of this court is not liable to attachment. *Bentley vs. Shrieve*, 412.

BILLS OF REVIEW.

1. A bill of review for new facts or newly discovered facts, must aver that such facts came to the knowledge of the complainant within nine months prior to the filing of his bill. *Hitch vs. Fenby*, 190.
2. Upon a supplemental bill, in the nature of a bill of review, the question always is, not what the plaintiff knew, but what, using due diligence, he might have known. *Ib.*

BOND OF CONVEYANCE.

See LOCATION OF.

CHOSE IN ACTION.

See SEQUESTRATION, &c., 1, 2, 3.

COMMISSIONS.

See TRUSTEES, &c., 5.

RECEIVERS, 9, 10.

ORPHANS COURT, 11.

AGREEMENTS, &c., 5, 6.

CONJUGAL RIGHTS.

See ALIMONY, 6, 7.

CONSIDERATION.

See SPECIFIC PERFORMANCE, 2, 3.

CONTRACTS, &c., 1.

CONSTITUTIONAL LAW.

1. It is no exercise of judicial power for the legislature to pass resolutions directing credits to be entered upon judgments recovered by the state against a county clerk, and the sureties upon his bond. *Wm. S. Green's Estate*, 349.
2. The state has control over her own claims, and the legislature may re-

CONSTITUTIONAL LAW—*Continued.*

- mit forfeitures incurred by public officers who have become debtors to the state, and in cases where they think proper may surrender interest, or allow, as a credit, interest on credits which they may admit should theretofore have been given; such an exercise of power is no violation of the 4th article of the declaration of rights. *Ib.*
3. These credits are a gratuitous grant by the state, and such a grant must be restricted to its obvious and plain intent, and be construed most favorably for the government. *Ib.*
 4. Wherever the state and a citizen have claims in equal degree, and a conflict arises by death or act of the party not having enough to pay his debts, the claim of the citizen must yield to the right of the state. *Ib.*

CONSTRUCTION OF ACTS, STATUTES, &c.

1. The act of 1841, ch. 161, protects the interest of the husband in real estate of the wife from *liability* for his debts during the life of the wife, and this protection extends to the proceeds of such estate when sold for the purposes of partition. *Hall vs. Hall*, 283.
2. The act of 1777, ch. 12, sec. 14, conferring jurisdiction upon the Chancellor in cases for alimony, gives full and complete jurisdiction over the subject, and does not restrict the court in making such allowance to the circumstances and causes which would entitle the party to a divorce, according to the ecclesiastical laws of England. *Jamison vs. Jamison*, 289.
3. Prior to the act of 1841, ch. 262, the legislature had the exclusive power of granting divorces, and they exercised it as a regular exertion of legislative power. *Ib.*
4. Prior to the act of 1835, ch. 380, a creditor could not claim the aid of a court of equity in following real estate fraudulently conveyed away by his debtor, without first obtaining a judgment at law, nor personal estate, thus conveyed, without issuing a *fiery facias*, but this act has changed the law, in this respect, in this state. *Wylie vs. Basil*, 327.
5. The provision of the 9th sec. of the act of 1786, ch. 45, prohibiting the commissioners when the land is not worth more than \$15 per acre, from dividing it into shares of less than fifty acres, forms no part of the act of 1820, ch. 191, and was purposely dropped by the legislature. *Wilhelm vs. Wilhelm*, 330.
6. The right of election given to the eldest son by the act of 1820, ch. 191, is a valuable right, but has no existence and cannot be enforced unless the commissioners determine that the estate cannot be divided without loss and injury to all the parties, and their return to this effect is confirmed by the court. *Ib.*
7. Where lands are divided in specie under the act of 1820, the commissioners have no power to assign the widow a portion of the land, *in fee*, equal to her dower in the whole, for this would be in effect making her a co-heir. *Ib.*
8. The legislature passed resolutions directing the treasurer "to examine the accounts" of a late county clerk, "and correct the same by cred-

CONSTRUCTION OF ACTS, STATUTES, &c.—*Continued*

iting him with the commissions allowed by law to county clerks on collections made, and which commissions may have been heretofore withheld because of his delay in making his payments into the treasury within the time limited by law, and with the interest upon the amount of said account," these credits to be "applied to judgments recovered by the state against said clerk, and his sureties," "but nothing herein contained shall relieve the defendants in said judgments from costs and the usual commissions to the state's attorney." **HELD—**

That by the true constructions of these resolutions the credits to be allowed could not exceed the amount of the judgments mentioned in them, and no excess of such credits could be applied to the extinguishment of other claims due by said clerk, to the state. *Wm. S. Green's Estate*, 349.

9. These credits are a gratuitous grant by the state, and such a grant must be restricted to its obvious and plain intent, and be construed most favorably for the government. *Ib.*
10. The summary proceedings prescribed by the act of 1833, ch. 181, are not applicable to mortgages of moneyed securities and bank stock. *Cronise vs. Clark et al*, 403.
11. The statement verified by affidavit directed by the 3d section of the act of 1833, ch. 181, to be filed, may be filed at any time before the sale. *Ib.*
12. The act of 1849, ch. 224, suspending the operation of the act of limitations in certain cases, is prospective, and not retrospective in its operation. *Shepherd vs. Bevans*, 408.
13. The 12th section of the 15th sub ch. of the act of 1798, ch. 101, applies only to contested questions, *inter partes*, and not to *ex parte* proceedings. *Conner vs. Ogle*, 425.

CONTRACTS.

1. A promise to allow a defendant a credit upon a decree against him, by which he was induced to waive his right of appeal, rests upon a good and valid consideration. *Matthews vs. Merrick*, 364.
2. An unqualified offer by complainants to allow the defendant a credit upon a decree in their favor, which offer was the result of negotiations previously had between the parties to settle the matters in dispute, in a friendly manner, cannot afterwards be withdrawn by them. *Ib.*
3. Contracts void at law are void in equity, and are considered by the latter courts, as well as the former, incapable of being made good by any subsequent acts of the parties. *Cronise vs. Clark*, 403.

See AGREEMENTS, &c.

CONTRIBUTION.

See PARTITION, 3.

ORPHANS COURT, 11.

CO-PARCENERS.

See PARTITION, 2.

CORPORATIONS.

See RECEIVERS, 9, 10

COSTS.

See LUNATIC LUNACY, 1.

TRUSTEES, &c., 2.

COUNSEL FEES.

COUNSEL FEES.

1. The first allowance is for costs of the commission, which includes legal costs with counsel fees paid by the petitioner in conducting the inquisition of lunacy, under which the party is found to be a lunatic, these are all allowed unless excluded by a previous order of the court. *Estate of Rachel Colvin*, 126.
2. Fees paid to counsel for conducting a controversy, as to whether the lunacy did or did not commence at an earlier date than the filing of the petition cannot be allowed out of the estate, they must be paid by the parties who carried it on. *Ib.*
3. Counsel fees paid for services rendered in litigating the question who should be appointed committee, will not be allowed out of the estate ; if the parties interested differ, and choose to litigate this point, they must do so at their own expense. *Ib.*
4. Fees paid for legal services rendered, the committee, in the discharge of his duty as such, in defending and protecting the estate of the lunatic, are proper and fair allowances. *Ib.*
5. Costs and counsel fees paid by the committee and receiver, in carrying on a controversy in the Orphans Court after the death of the lunatic in regard to the appointment of an administrator, cannot be allowed out of the estate. *Ib.*
6. The estate cannot be charged with the cost of a litigation about the appointment of a receiver, the parties carrying on such a controversy must do so at their own expense. *Ib.*
7. The committee and receiver holds his office at the discretion of the court, and if a dispute arise in regard to the propriety of continuing him in it, or appointing some one in his stead, it must be conducted by the parties at their own expense. *Ib.*
8. If the official conduct of the committee be assailed, he may defend it, and if he does so successfully, the assailant will be made to pay costs, but fees to counsel, even in that case, should not be thrown upon the estate. *Ib.*
9. The committee will be allowed all proper and reasonable fees paid to counsel for advice and assistance in the discharge of his duty, and in aiding him to preserve and defend the estate, but beyond this he cannot go ; if he chooses to carry on a litigation for his office, he must pay the costs himself. *Ib.*
10. Where trustees are entitled to costs out of the fund, they will be taxed as between solicitor and client, and if a trustee finds it necessary to employ counsel as to the proper management of the estate, he will be allowed such reasonable fees as he may have paid, but counsel fees paid by the successful party, in a contest as to who shall administer the trust, will not be allowed out of the fund. *McKim vs. Handy*, 228.

COUNSEL FEES—*Continued.*

11. Counsel fees are allowed to trustees, but a party who occupies simply the character of stakeholder will not be allowed such fees out of the funds in his hands. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
12. Counsel fees for services rendered by a solicitor at the instance of an attorney in fact of the *cestui que trust*, will not be allowed out of the trust fund. *Laroque vs. Candolle*, 347.
13. The trustee will be allowed all his reasonable costs and expenses including money paid in properly taking the opinion, and procuring the direction and assistance of counsel in administering the trust, but this is the utmost extent to which the practice has been carried. *Ib.*

COVENANT.

See AGREEMENTS, &c.

CREDITORS.

See PRACTICE IN CHANCERY, 27 to 30, 36, 38, 45, 46, 49, 52.

FRAUDULENT CONVEYANCES, 2.

INSOLVENT DEBTORS.

CREDITOR'S BILL.

See PRACTICE IN CHANCERY, 38, 52.

CROPS.

See WILL AND TESTAMENT, 29.

CROSS PAPER.

1. Where cross paper is given for mutual accommodation, each party is liable to pay his own, and the holder of cross paper may prove, under a commission, by taking up his own note or exonerating the estate of the bankrupt. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.

DECREE OF COURT OF APPEALS.

See INJUNCTION, 5.

DECREE TO ACCOUNT.

See PRACTICE IN CHANCERY, 45, 46.

DEEDS, CONSTRUCTION OF, &c.

1. A deed was executed in 1835, conveying certain lands, in trust, with power to the grantee to sell the same and apply the proceeds to pay, *first*—A specified debt. *Second*—All other debts of the grantor for which the grantee was responsible, and any advances the latter might make for the former. *Third*—All other debts of the grantor at that time contracted which the grantee might consider just, legal and equitable, and *fourth*—The expenses of the trust. The grantor died in 1837, and the grantee not having sold the property, a bill was filed in 1842, by the creditors of the grantor, under which all his real estate was sold for the payment of his debts. **HELD**—

1st. That the grantee, by virtue of this deed, had a lien only on the land described in and conveyed by it, but he may show himself a creditor beyond the provisions of the deed, and in respect of any such claim he will stand upon an equality with the general creditors of the grantor.

2d. That the claims of the grantee within the terms of the deed, and with reference to the proceeds of the property thereby conveyed,

DEEDS, CONSTRUCTION OF, &c.—Continued.

are not liable to the plea of limitations, but with regard to the proceeds of any other property of the grantor they are so liable.
Gibbs vs. Cunningham, 322.

DEFICIENCY IN LAND SOLD.

See **AGREEMENTS, &c.**, 1.

DEMURRER.

See **PARTNERSHIP, PARTNERS**, 20.

PRACTICE IN CHANCERY, 48.

DILIGENCE.

See **PRACTICE IN CHANCERY**, 25, 26.

MISTAKE, 2, 4.

DIVORCE A MENSA ET THORO.

See **ALIMONY**, 1 to 9.

DONATIO MORTIS CAUSA.

See **GIFTS INTER VIVOS OR MORTIS CAUSA**.

DOWER.

1. A husband purchased land of S. and gave his notes for the purchase money, and to secure the payment thereof, agreed that G., of whom he had purchased other land at trustee's sale, on which he owed a small balance of purchase money, and which was paid off by S., should convey the same to S., in trust, to secure said balance, and also said notes; S. was also the assignee of a judgment rendered against the husband, upon whose death a bill was filed to sell his real estate to pay debts, and it was agreed that the widow's dower should be laid off in the land so conveyed by G. to S. **HELD—**

That the husband had an equitable interest in the land conveyed by G. to S. subject to the payment of the sums secured by that deed, but not liable to the judgment so as to defeat the widow's title to dower: that judgment having been recovered after the marriage, is subordinate to the claim of dower, which commenced with the marriage and the purchase by the husband from G. *Stewart vs. Beard*, 319.

2. If the provision made for the widow, who abides by the will, does not exceed her common law rights, a general legacy to her will not abate to pay debts in favor of specific legatees, she being considered a purchaser with a fair consideration. *Mayo vs. Bland*, 484.
3. A widow cannot renounce the will as to personalty, and claim the benefit of it as to the realty; she must either renounce the whole or be barred as to both the realty and personalty. *Ib.*
4. An averment in a bill, "that the property bequeathed to the widow is liable to pay debts" is a sufficient averment, that the benefits taken by her under the will are greater than her legal rights, because such liability depends upon this fact. *Ib.*

See **PARTITION**, 6, 8.

ELECTION.

See **PRACTICE IN CHANCERY**, 12.

WILL AND TESTAMENT, 2.

ESCHEAT PATENTS.

See PARTITION, 7.

LAND OFFICE, 1 to 3.

EVIDENCE.

1. The recitals in an escheat warrant of the death of a party without heirs, are not *prima facie* evidence that the land is liable to escheat so as to throw the burden of proving the contrary upon the party who resists the patent. *Goodwin vs. Caton*, 160.
2. Where a certificate has been regularly returned on an escheat warrant, and remained long enough in the land office to justify the issuing of a grant, a reasonable *prima facie* presumption arises that the land is escheatable. *Ib.*
3. An escheat grant is *prima facie* evidence that the land granted is liable to escheat. *Ib.*
4. The antedating of notes is not, *per se*, fraudulent or evidence of a dishonest intent, but where parties with a security before them covering a particular description of notes, make notes which upon their face are not within its terms, they cannot show by parol that such notes were antedated in order to bring them within the security. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
5. It may be shown by parol evidence which of two parties to a pecuniary obligation, binding upon both, is the principal debtor, so as to adjust the equities as between themselves. *Brown vs. Stewart*, 368.
6. An instrument under seal, attested by a subscribing witness, may be proved in this state without calling such witness. *Shepherd vs. Bevans*, 408.
7. The president and cashier are competent witnesses for the bank, to prove at what time a trustee had knowledge of the transfer of certain stock, part of his trust fund, standing on the books of the bank. *Wayman vs. Jones*, 500.
8. Two co-heirs executed a deed of partition, in which they mutually covenanted that each should hold his part of the land free, and discharged from all title, interest, claim and demand of the other, but neither covenanted to assure the title of the other. **HELD—**

That one of these co-heirs is a competent witness for the other in an action brought by the latter against a third party, involving the title to a part of the estate conveyed to the plaintiff by the deed of partition. *Morris vs. Harris*, 529.

See INSOLVENT DEBTOR, 1, 2.

PRACTICE IN CHANCERY, 5, 6, 15, 40.

SPECIFIC PERFORMANCE, 5, 6.

INFANCY, INFANTS, 4.

LAND OFFICE, 17.

EXCEPTIONS TO TESTIMONY.

See PRACTICE IN CHANCERY, 17, 18, 19.

EXECUTORS AND ADMINISTRATORS.

See PRACTICE IN CHANCERY, 45.

ORPHANS COURT, 1 to 10, 13

EXECUTORS AND ADMINISTRATORS—*Continued.*

See AGREEMENTS, 4, 5.

WILL AND TESTAMENT, 22.

LIMITATIONS, 5, 7, 8, 9.

EXTINGUISHMENT.

See VENDOR'S LIEN, 2.

WILL AND TESTAMENT, 22.

FEES.

See COUNSEL FEES.

FEME COVERT.

See MARRIED WOMEN.

FRAUD.

See FRAUDULENT CONVEYANCES.

INSOLVENT DEBTOR, 5.

EVIDENCE, 4.

FRAUDULENT CONVEYANCES.

1. Where a party seeks to avoid deed as fraudulent under the statute of Elizabeth, he must allege and prove the existence of creditors at the date of the conveyances, or that the grantor contracted debts subsequently in respect of which the deeds would be regarded as fraudulent. *Faringer vs. Ramsay & Ehrman*, 33.
2. Prior to the act of 1835, ch. 380, a creditor could not claim the aid of a court of equity in following real estate fraudulently conveyed away by his debtor, without first obtaining a judgment at law, nor personal estate, thus conveyed, without issuing a *fieri facias*, but this act has changed the law, in this respect, in this state. *Wylie et al vs. Basil*, 327.
3. The wife's share of the grandmother's personal estate was paid by the executor to the husband in his own right, and was applied by him in the purchase of property for which he took the deed in his own name, in 1842, and held the property in his own until 1847, when it was conveyed to his wife. **HELD—**

That under these circumstances the property could not be regarded as belonging to the wife, but was liable to the husband's creditors. *Ib.*

See INSOLVENT DEBTOR, 1 to 5.

ASSIGNMENTS IN FAVOR OF CREDITORS.

EQUITABLE ASSIGNMENT.

See ASSIGNMENT, 1 to 4.

GIFTS INTER VIVOS OR MORTIS CAUSA.

1. A party shortly before his death delivered a note due him to a friend, with directions to collect and apply it to certain purposes for the benefit of his wife, but died before the money collected was so applied.

HELD—

That this does not amount to a gift *inter vivos* or *mortis causa*, and the proceeds of the note belong to the estate of the deceased. *Thompson & Waters vs. Dorsey*, 149.

GUARDIAN AND WARD.

See SET-OFF, 3.

HUSBAND AND WIFE.

1. The wife is entitled to a provision out of her estate, when the aid of a court of equity is necessary to enable the husband or his assignees to get possession of it, as a matter of *right*, but the amount is a subject of discretion depending upon the special circumstances of each case. *Hall vs. Hall*, 283.
2. The act of 1841, ch. 161, protects the interest of the husband in real estate of the wife from *liability* for his debts during the life of the wife, and this protection extends to the proceeds of such estate when sold for the purposes of partition. *Ib.*
3. The wife's share of the grandmother's personal estate was paid by the executor to the husband in his own right, and was applied by him in the purchase of property for which he took the deed in his own name, in 1842, and held the property as his own until 1847, when it was conveyed to his wife. **HELD—**

That under these circumstances the property could not be regarded as belonging to the wife, but was liable to the husband's creditors
Wylie vs. Basil, 327.

See MARRIED WOMEN.

ANTENUPTIAL SETTLEMENT.

IMPROVEMENTS ON LAND.

See SPECIFIC PERFORMANCE, 3.

INADEQUACY OF PRICE.

1. If the grantor be *compos mentis*, and there be no fraud or imposition practiced upon him by the grantee, the transfer must stand though the thing sold be worth four times as much as by the contract was agreed to be paid for it. *Robinson vs. Robinson*, 167.
2. Where property is sold for \$750, which is worth \$2800, the inadequacy is so great as to shock the conscience, and to amount in itself to conclusive and decisive evidence of fraud, and would of itself be a sufficient ground for refusing a specific performance of the contract if it remained unperformed. *Ib.*

See SALES BY TRUSTEES, 1.

INCREASE OF FEMALE SLAVES

See WILL AND TESTAMENT, 12.

INFANCY, INFANTS.

1. Making the infants complainants, does not dispense with the necessity of proof in support of the allegation that it will be for their interest to have the land sold. *Watson vs. Godwin*, 25.
2. Neither the answer of the infant, nor the answer of adult defendants confessing the fact, is evidence to affect the infant. *Ib.*
3. In this state the legal minority of a female infant, so far as the capacity to receive from the guardian is concerned, ends at the age of eighteen, and she is then entitled to receive her property, but for many purposes her legal minority does not cease until she is twenty-one years of age. *McKim vs. Handy*, 228.

INFANCY, INFANTS—*Continued.*

4. The answer of an infant by his guardian is not evidence against him, and the necessity of establishing the case as stated in the pleadings by proof is not obviated by making the infant a plaintiff. *Benson vs. Wright et al*, 278.
5. A mortgage of her reversionary interest in real and personal estate, executed by a *feme covert* infant to secure a debt due by a firm of which her husband was a member, is absolutely void and incapable of confirmation. *Cronise vs. Clarke et al*, 403.
6. She may insist upon her incapacity to execute such an instrument notwithstanding a decree has been passed for the sale of the mortgaged property under the act of 1833, ch. 181, the proceeding to obtain such decree under that act being *ex parte*. *Ib.*

INJUNCTION.

1. Upon a motion to dissolve an injunction, the responsive averments of the answer in the absence of countervailing testimony are to be taken as true, and if the facts constituting the equity of the bill are denied by such positive responsive averments, the injunction must be dissolved. *Wood vs. Patterson*, 335.
2. In this case an injunction was granted upon the averment in the bill, that defendant offered to compromise a balance appearing to be due the complainant by certain accounts rendered, by the payment of a certain sum, and that in the addition of these accounts there was an error of \$1,000. The answer denied this allegation by averring that defendant's offer was made without any reference to the stated balance, but with reference to the details and items of the account, and to the grounds of the defendant's claims against complainant. **HELD—**
That the equity of the bill is sworn away by this answer, and the injunction must be dissolved. *Ib.*
3. The Court of Chancery in this state will not interfere by injunction where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction at law. *Cockey vs. Carroll*, 344.
4. Upon motion to dissolve an injunction upon bill and answer, the answer, when speaking responsively to the bill, must be taken as true, and if it denies the averment of the bill upon which the equity for the injunction rests, the injunction must be dissolved. *Harris vs. Sangstons*, 394.
5. Though this court has not the power to review, in the proper sense of that term, a decree of the Court of Appeals, either upon the state of facts upon which that court acted or any others, yet when a state of facts has arisen since such decree was passed showing its *satisfaction*, this court may interfere by injunction to prevent the decree from being used as an instrument of injustice, and an original bill is the proper form to be adopted in such circumstances. *McClellan vs. Crook*, 398.
6. On motion to dissolve on bill and answer, so much of the bill as is not denied by the answer, is taken for true. *Cronise vs. Clark et al*, 403.

INJUNCTION—*Continued.*

7. The averment in the bill of the infancy of the complainant at the time she executed the mortgage, though not admitted by the answer, and proof called for to sustain it, must, on motion to dissolve, be taken to be true. *Ib.*
8. Where the party against whom a judgment at law has been rendered, did not, before or at the time of its rendition, know of facts which would have constituted a valid defence at law, so that he could not then have availed himself of them, he will be entitled to relief in equity against the judgment. *Ighart vs. Mayer*, 514.

See PRACTICE IN CHANCERY, 9, 46, 48.

INSOLVENT DEBTOR.

1. Where the trustee attempts to vacate an assignment of the insolvent, as in violation of the insolvent system, he is not required to offer direct evidence of the facts upon which he relies, but may avail himself of circumstances to establish the intent with which the assignment was made, and if they be sufficiently strong, it will be set aside. *Brooks vs. Thomas & Jerome*, 15.
2. But where the answer or evidence of the insolvent denies such intent, the difficulty of making it out is materially increased, and nothing short of circumstances of the strongest description will justify the court in disregarding such answer or evidence. *Ib.*
3. There must be both the intent to prefer, and to take the benefit of the insolvent laws, or the transfer will not be disturbed. *Ib.*
4. To avoid a transfer or payment, under the 1st section of the act of 1834, ch. 293, *actual notice* must be brought home to the preferred creditor of the insolvency of the debtor; mere technical or constructive notice is not sufficient. *Ib.*
5. Where a party seeks to avoid deeds as fraudulent under our insolvent system, he must allege in his bill and prove, that the grantor was indebted at the time of the execution of the conveyances sought to be vacated, and that the deeds were made or caused to be made by him with a view or expectation of taking the benefit of the insolvent laws. *Faringer vs. Ramsay & Ehrman*, 33.
6. A bill was filed in this case by a vendor for the sale of a certain parcel of land to pay the vendor's lien, and a decree was passed accordingly, which upon appeal was affirmed by the Court of Appeals; after the decree, but before the sale had actually taken place, the defendant, the vendee, applied for the benefit of the insolvent laws, and his trustee in insolvency was duly appointed, who applied to the court to stay execution of the decree upon the ground that by the proceedings in insolvency the right to make the sale is exclusively vested in the trustee of the insolvent. **HELD—**

That the proceedings in insolvency did not put a stop to the proceedings in this court, and its trustee was still bound to execute the decree by a sale of the property. *Hurt vs. Stul*, 391.

JUDGMENTS.

1. Two judgments were rendered against a party on the same day, one at

JUDGMENTS—*Continued.*

the suit of the state, and the other at suit of a private citizen, that of the state standing first upon the docket. **HELD—**

That the judgment in favor of the state is entitled to priority in payment. *Wm. S. Green's Estate*, 349.

2. Where three years have elapsed after the rendition of a judgment, and no *fiat* has been entered upon the *scire facias*, the judgment must be presumed to be satisfied, or at least not in a condition to be enforced at law. *Hodges vs. Sevier*, 382.
3. Where mortgaged property has been sold under a decree of this court, and a judgment has been rendered against the mortgagor, prior to the mortgage, which had become dormant by lapse of time, and no *fiat* had been entered upon the *scire facias* to revive it, the judgment creditor cannot, in such condition of his judgment, contest with the mortgagee, in this court, the application of the proceeds of the sale of the mortgaged premises. *Ib.*

See PRACTICE IN CHANCERY, 48.

INJUNCTION, 8.

JURISDICTION.

See PRACTICE IN CHANCERY, 4, 14, 15.

ALIMONY, 1, 3, 5, 6, 7.

INJUNCTION, 5.

ORPHANS COURT, 3, 10.

LACHES.

See ASSIGNMENT, 5.

LAND OFFICE.

1. The recitals in an escheat warrant of the death of a party without heirs, are not *prima facie* evidence that the land is liable to escheat so as to throw the burden of proving the contrary upon the party who resists the patent. *Goodwin vs. Caton*, 160.
2. Where a certificate has been regularly returned on an escheat warrant, and has remained long enough in the land office to justify the issuing of a grant, a reasonable *prima facie* presumption arises that the land is escheatable. *Ib.*
3. An escheat grant is *prima facie* evidence that the land granted is liable to escheat. *Ib.*
4. An escheat grant will pass all the land comprehended within the true location of the tract escheated; it relates back, by operation of law, to the original grant, and is within the rule of law, of relation between grants and certificates. *Jones vs. Badley*, 167.
5. But this doctrine of relation is founded upon a principle of equity, and where an escheator *expressly* excepts from his survey a part of the tract escheated and does not pay for it, the doctrine does not apply. *Ib.*
6. As a general rule, lands which have escheated cannot be taken up under a common warrant as vacant lands. *Ib.*
7. But where no fraud or imposition has been practiced upon the state, and there were no improvements upon the land which the party had

LAND OFFICE—*Continued*

- taken up under a common warrant, honestly supposing it was vacant, paid the purchase money therefor and erected improvements thereon, the grant will not be refused though the land be escheat. *Ib.*
8. The Chancellor, sitting as judge of the land office, may decree according to equity and good conscience, and agreeably to the principles established in the High Court of Chancery, as if the matter were brought before him by a bill in Chancery. *Ib.*
 9. It is a general rule of the land office to issue the patent when the right is doubtful, in order that the party may not be deprived of the privilege of taking the judgment of a court of law upon its efficacy. *Ib.*
 10. It is the settled rule of the land office, that a patent will not be granted for lands taken up under a warrant of resurvey, which are not contiguous. *Wilson vs. Markle*, 534.
 11. A party has the right to abandon the land which was not liable to be taken up under his warrant, and have the survey corrected to this extent, but he cannot at the same time keep open the question whether a correction is necessary at all. *Ib.*
 12. As a general rule, no patent will issue for any land for which a patent has been previously granted so long as such patent remains in force, and exceptions to this rule should be admitted with much caution. *Smith vs. Baker*, 29.
 13. Escheat land must be taken up by a warrant of escheat, and if under such a warrant it is included as vacancy, the title does not pass to the patentee but remains in the state. *Ib.*
 14. Where a party takes up escheatable lands as vacancy, and obtains a patent therefor, the title does not pass, and such lands are liable to be granted under an escheat warrant, notwithstanding the pre-existing patent. *Ib.*
 15. There is no rule of the land office, which requires that a *caveat* shall be dismissed because the caveator did not show an interest in the matter in dispute. *Chisholm vs. Perry*, 31.
 16. The judge may on *caveat* or on application for a patent, where there is no *caveat*, refuse a patent on account of a violation of the rules of the land office. *Ib.*
 17. Plats authenticated by the signature of the county surveyor, and returned under the orders of the court, must be treated as evidence and have weight accordingly. *Ib.*
 18. The right to a warrant of resurvey, only appertains to a party who has a fee simple interest in the original tract proposed to be resurveyed, and by parting with the title to such tract subsequent to the date of the warrant, the latter loses its effect as a warrant of resurvey. *Twigg vs. Jacobs*, 541.
 19. A warrant of resurvey may operate as a common warrant, and affect any vacant land which a common warrant could effect. *Ib.*
 20. The state will never knowingly grant the same land a second time. *Ib.*
 21. A certificate of survey embraced several lots contiguous to each other,

LAND OFFICE.—Continued.

but upon a *caveat* it was admitted, that two of these lots belonged to another party, by the intervention of which, the contiguity of the others was destroyed. **HELD—**

That the certificate may be corrected, so as to exclude from the survey certain lots separated from the others by this intervention.
Baker vs. Naylor, 542.

LAPSE OF TIME.

See **PRACTICE IN CHANCERY**, 23.

SALES BY TRUSTEES, 3.

JUDGMENTS, 2, 3.

TRUSTEE AND CESTUI QUE TRUST.

LEGACY, LEGATEE.

See **WILL AND TESTAMENT**, 5, 6, 7, 9, 10, 15, 21 to 23, 24 to 29.

ORPHANS COURT, 11.

LIEN.

1. The clerk of a steamboat has a lien upon the vessel for his claim for wages, and stands in that respect upon an equal footing with the crew.
Abbott vs. Steam Packet Co., 310.

2. The captain of a steamboat drew an order upon the company, upon which the clerk advanced the money and applied it to pay the crew.

HELD—

That this order operated as an assignment of so much of the fund out of which the crew were to be paid, and substituted the clerk in the place of the crew and entitled him to their rights as their assignee. *Ib.*

See **VENDOR'S LIEN.**

DEEDS, CONSTRUCTION OF, &c., 1.

LIMITATIONS.

1. Where the real estate of an intestate is sold for the payment of his debts, the operation of the statute of limitations, so far as the heirs at law are concerned, is suspended for the space of eighteen months from the death of the intestate, by the act of 1849, ch. 224. *Thompson & Waters vs. Dorsey*, 149.
2. It is an established rule of the Chancery Court that the statute of limitations runs against a claim or debt down to the time it is exhibited. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
3. Where a promissory note is secured by a mortgage, the mortgagee having the legal title, is not ousted by his note's being barred by limitations, because the debt only is barred and the party holding the title may retain his legal advantage. *Ib.*
4. Parties who are entitled to be substituted in the place of such mortgagees, are entitled to the same exception from the operation of the statute with respect to proceeds of the mortgaged property. *Ib.*
5. A deed was executed in 1835, conveying certain lands, in trust, with power to the grantee to sell the same and apply the proceeds to pay, *first*—A specified debt. *Second*—All other debts of the grantor for which the grantee was responsible, and any advances the latter might

LIMITATIONS—Continued.

make for the former. *Third*—All other debts of the grantor at that time contracted which the grantee might consider just, legal and equitable, and *fourth*—The expenses of the trust. The grantor died in 1837, and the grantee not having sold the property, a bill was filed in 1842, by the creditors of the grantor, under which all his real estate was sold for the payment of his debts. **HELD**—

That the claims of the grantee within the terms of the deed, and with reference to the proceeds of the property thereby conveyed, are not liable to the plea of limitations, but with regard to the proceeds of any other property of the grantor they are so liable.

Gibbs vs. Cunningham, 322.

6. The act of limitations does not apply to the claim of one of two administrators, against the estate of his intestate; he cannot sue himself at law. *Brown vs. Stewart*, 368.
7. The act of 1849, ch. 224, suspending the operation of the act of limitations in certain cases is prospective, and not retrospective in its operation. *Shepherd vs. Bevans*, 408.
8. Where an executor is himself the creditor of the estate, limitations will not bar his claim, for he cannot institute suit against himself for the recovery of the debt. *Spencer vs. Spencer*, 456.
9. By our testamentary system, the executor or administrator alone can plead limitations to claims against the personal estate of the deceased. *Ib.*
10. A trust in a will to pay debts, against which the statute of limitations has run at the death of the testator, will not revive them; but the trustee alone has the authority to plead it. *Ib.*

LOCATION OF BOND OF CONVEYANCE.

1. The home line of tract of land as described in a bond of conveyance was, "*thence down said branch to the beginning.*" **HELD**—

That this line must be run with the meanders of the branch, and not in a *straight* line to the beginning. *Smallwood vs. Hutton*, 95.

LUNATIC LUNACY.

1. If the committee of the person and estate of a lunatic has given a well secured bond for the faithful administration of his trust, and is in other respects a fit person to have the custody and estate of the lunatic, his insolvency, in fact, (not having taken the benefit of the insolvent laws,) is not cause for removal. *Estate of Loriman Chew*, 60.
2. Expenditures for stationery do not come within the range of disbursements, which a committee or receiver is permitted to make at the expense of the estate. *Estate of Rachel Colvin*, 126.
3. The first allowance is for costs of the commission, which includes legal costs with counsel fees paid by the petitioner in conducting the inquisition of lunacy, under which the party is found to be a lunatic, these are all allowed unless excluded by a previous order of the court. *Ib.*
4. Fees paid to counsel for conducting a controversy, as to whether the lunacy did or did not commence at an earlier date than the filing of

LUNATIC LUNACY—Continued.

the petition, cannot be allowed out of the estate, they must be paid by the parties who carried it on. *Ib.*

5. Counsel fees paid for services rendered in litigating the question who should be appointed committee, will not be allowed out of the estate; if the parties interested differ, and choose to litigate this point, they must do so at their own expense. *Ib.*
6. Fees paid for legal services rendered, the committee, in the discharge of his duty as such, in defending and protecting the estate of the lunatic, are proper and fair allowances. *Ib.*
7. Costs and counsel fees paid by the committee and receiver, in carrying on a controversy in the Orphans Court after the death of the lunatic in regard to the appointment of an administrator, cannot be allowed out of the estate. *Ib.*
8. The estate cannot be charged with the cost of a litigation about the appointment of a receiver, the parties carrying on such a controversy must do so at their own expense. *Ib.*
9. The committee and receiver holds his office at the discretion of the court, and if a dispute arise in regard to the propriety of continuing him in it, or appointing some one in his stead, it must be conducted by the parties at their own expense. *Ib.*
10. If the official conduct of the committee be assailed, he may defend it, and if he does so successfully, the assailant will be made to pay costs, but fees to counsel, even in that case, should not be thrown upon the estate. *Ib.*
11. The committee will be allowed all proper and reasonable fees paid to counsel for advice and assistance in the discharge of his duty, and in aiding him to preserve and defend the estate, but beyond this he cannot go; if he chooses to carry on a litigation for his office, he must pay the costs himself. *Ib.*

MANUMISSION.

See WILL AND TESTAMENT, 13.

NEGROES AND SLAVES.

MARRIED WOMEN.

1. A married woman has no power over her separate estate but what is specially given, and to be exercised only in the mode prescribed, if the mode be prescribed. *Tarr & Blass vs. Williams and wife*, 68.
2. A married woman has no power over her separate estate but such as has been specially given to her, and in exercising the power of disposition she is restricted to the particular mode specified in the instrument under which she takes when it undertakes to make such specification. *Williams and wife vs. Donaldson*, 414.

MASTER OF VESSEL.

See SALE OF VESSEL IN FOREIGN PORT, 1, 2.

PRIMAGE.

SEAMEN.

MISTAKE.

1. Equity has jurisdiction to grant relief in cases where parties have done

MISTAKE—Continued.

acts or entered into contracts under a mistake or ignorance of a material fact ; and this power is not confined to cases where a fact has been studiously suppressed or concealed by one of the parties, but embraces many cases of innocent ignorance and mistake on both sides. *Wood vs. Patterson*, 335.

2. But if the mistake is the result of the party's own carelessness or inattention, the court will not interfere in his behalf, its policy being to grant relief to the vigilant, and to put all parties upon the exercise of a reasonable degree of diligence. *Ib.*
3. If the fact be unknown to the parties, or each has equal or adequate means of information in regard to it, and the parties have acted with good faith, equity will not interfere. *Ib.*
4. In this case an injunction was granted upon the averment in the bill, that defendant offered to compromise a balance appearing to be due the complainant by certain accounts rendered, by the payment of a certain sum, and that in the addition of these accounts there was an error of \$1,000. The answer denied this allegation by averring, that defendant's offer was made without any reference to the stated balance, but with reference to the details and items of the account, and to the grounds of the defendant's claims against complainant. **HELD—**
That equity of the bill is sworn away by this answer, and the injunction must be dissolved. *Ib.*
5. If parties come to a settlement upon terms mutually agreed upon, and error or mistake occur in the settlement, a court of equity will rectify it and make it conform to the intention of the parties. *Gill vs. Clagett*, 470.
6. Equity will, upon sufficient parol proof, reform a contract or settlement in writing upon the ground of mistake, and then enforce its executions as thus reformed, though the answer denies the mistake, but strong proof must be adduced to overrule the answer denying the mistake. *Ib.*

See SPECIFIC PERFORMANCE, 5, 6.

MORE OR LESS.

1. A party contracted to purchase for a gross sum, a tract of land containing one hundred acres, "be the same more or less." **HELD—**
That these words so far qualified the representation of quantity as to preclude either party from any just claim to relief on account of deficiency or surplus, unless it be of such a character as to induce the belief of fraud or mistake. *Smallwood vs. Hatton*, 95.

MORTGAGE, MORTAGOR AND MORTGAGEE.

See SUBSTITUTION, 1.

LIMITATIONS, 3, 4.

SALES BY TRUSTEES, 3.

CONSTRUCTION OF ACTS AND STATUTES, 10, 11.

JUDGMENTS, 3.

INFANCY, INFANTS, 5, 6.

MOTION TO BRING MONEY INTO COURT.

See PRACTICE IN CHANCERY, 1, 2.

MUTATION OF REALTY TO PERSONALTY.

1. Real estate, in which an infant was interested, was sold under a decree of this court, which sale was finally ratified and confirmed by an order of court. But the purchaser afterwards failed to comply with the terms of sale, and the trustee applied for a resale under the act of 1841, ch. 216, and an order passed accordingly, after which and before the second sale, the infant died. **HELD—**

That the mutation from realty to personalty was not complete at the death of the infant, the purchaser not having complied with the terms of sale, and her share of the proceeds of sale passed as real estate to her heir at law. *Dalrymple vs. Taneyhill*, 171.

2. The mutation is complete when the sale is ratified, and the purchaser has complied with the terms of it by paying the money, if the sale is for cash, or by giving bonds, if the sale is on credit, and a concurrence of all these circumstances is necessary to effect the change. *Ib.*
3. A testator devised all his estate, "both real and personal," to his wife for life, and after her death directed his executor to "sell his real estate and pay to each of his three grandchildren" \$1,000 each, when they arrive at the age of twenty-one. **HELD—**

That this direction in view of a court of equity, operated a conversion of the real estate out and out into money. *Carr vs. Ireland*, 251.

NEGROES AND SLAVES.

1. Where negro slaves are manumitted by deed or will, and the real and personal estate of the manumittor or testator are insufficient for the payment of his debts, his creditors may file a bill in equity making the manumitted slaves and all persons interested parties, and have an account taken of all the property of the deceased, and if it shall prove insufficient to pay his debts, the manumitted slaves may be decreed to be sold for that purpose, either for life or a term of years, as the circumstances or the nature of the case may require. *Allein vs. Hutton*, 537.

See **WILL AND TESTAMENT**, 12, 13.

NOTICE.

1. To avoid a transfer or payment, under the 1st section of the act of 1834, ch. 293, *actual notice* must be brought home to the preferred creditor of the insolvency of the debtor; mere technical or constructive notice is not sufficient. *Brooks vs. Thomas & Jerome*, 15.

See **TRANSFER OF STOCK**, 1, 2.

PRACTICE IN CHANCERY, 44.

ORPHANS COURT.

1. It is the duty of an executor to use dispatch in the settlement of the estate; the period allowed by law for that purpose is not a prescribed delay, but rather a restriction of it. *Conner vs. Ogle*, 425.
2. Where the same person is both trustee and executor under a will, and settles up the personal estate in the Orphans Courts, the balance, after such settlement, remains in his hands as trustee, and not as executor. *Ib.*

ORPHANS COURT—*Continued.*

3. There is no special power or jurisdiction given to the Orphans Courts over a trust created by a will for the support of minor children, and that court has no general jurisdiction over trusts. *Ib.*
4. Accounts passed by administrators and executors in the Orphans Courts, are themselves *prima facie* evidence of their correctness. *Ib.*
5. The executor or administrator administers the estate *in pais*, and the obligation is upon him to ascertain the individuals entitled to legacies, distributive shares and residues, and not upon the Orphans Court. *Ib.*
6. The power given by the act of 1798, ch. 101, to distribute the surplus is not the same as that to pass the claims of creditors, or make allowances in the settlement of the estate. *Ib.*
7. An order of the Orphans Court, directing an executor to pay "to the guardian of the minor children of G. and M. the property in his hands, to which said children are entitled under the will of H. M.," where the executor has not complied with requisitions of the 12th sec. of the 14th sub ch. of the act of 1798, ch. 101, will not protect him in the payment of a balance of money in his hands as executor, against the claims of other parties than those for whose benefit he paid the same. *Ib.*
8. The 12th section of the 15th sub ch. of the act of 1798, ch. 101, applies only to contested questions, *inter partes*, and not to *ex parte* proceedings. *Ib.*
9. Wherever there is a suit in Chancery, by an executor or any person interested in the estate, for the administration of the assets, and the executor pays either to creditors, legatees, or distributees, by order of the court, he is protected by the order. *Ib.*
10. But the Orphans Courts have no jurisdiction, except what is given by the legislature, and they must exercise the powers given in accordance with the grant. *Ib.*
11. In case of a deficiency of assets to pay debts, general legacies must be exhausted before the specific legacies can be resorted to for contribution, and this rule prevails though the general legatee be the widow of the testator, where the provisions made for her by the will exceed her common law rights, at least so far as the excess is concerned. *Mayo vs. Bland*, 484.
12. Commissions to an executor will not be distributed so as to be thrown upon the separate portions of the personal estate, in order to make the several legatees, general and specific, bear their proportions thereof; such a distribution would be introducing an entirely new principle in our testamentary system. *Ib.*
13. Real estate was directed by a will to be sold by the executor for the benefit of all parties interested in the estate, which was accordingly sold by the executor under the act of 1831, ch. 315, sec. 10. **HELD—**That the proceeds of such estate is to be treated as a portion of the personal assets, and is liable for the debts of the testator. *Mad-dox vs. Dent*, 543.

See PRACTICE IN CHANCERY, 43.

PARENT AND CHILD.

1. A father is bound to educate and maintain his infant child, and if another person performs this natural duty for him, with his knowledge and consent, the father is liable to pay a reasonable sum to such person. *Thompson & Waters vs. Dorsey*, 149.
2. To such a case the Statute of Frauds has no application, for the debt is the debt of the father and not of the son, and therefore is not an attempt to charge him with the debt of a third person. *Ib.*

PAROL PROOF.

See RESULTING TRUSTS, 1, 2.

SPECIFIC PERFORMANCE, 5, 6, 8.

EVIDENCE, 5.

MISTAKE, 6.

PARTITION.

1. In a proceeding for the partition of the real estate of an intestate, two of his children, to whom he had in his lifetime given certain portions of his estate, and of which they had taken possession, and made expensive improvements thereon, under the promise or agreement of their father that the property should be theirs, were made *defendants*, and they insisted that the land so claimed and possessed by them was not liable to partition. **HELD—**

That under the case as presented, the parties claiming the lands being *defendants*, and not asking the active interposition of the court in their favor, partition of these lands should not be decreed.

Haines vs. Haines, 133.

2. At common law upon partition between coparceners there is an implied warranty that if either loses any of his share by eviction, on account of defect of title in the ancestor, the party evicted may enter upon the others and defeat the partition, or by proper proceedings, may obtain recompense for the part lost. *Dugan vs. Hollins*, 139.
3. A deed of partition was executed between several parties without covenants, and the portion assigned to one was made responsible for the payment of a decree against the ancestor. **HELD—**

That he had a right to call upon the other parties in chancery, to contribute their proportions of the money paid by him in discharge of this decree.

4. The judgment of the commissioners to divide real estate, in regard to its susceptibility to be divided among all the heirs, though not absolutely conclusive, will not be disbursed without proof demonstrating error of judgment, or partiality, or some other good reason for disregarding it. *Wilhelm vs. Wilhelm*, 330.
5. The provision of the 9th sec. of the act of 1786, ch. 45, prohibiting the commissioners when the land is not worth more than \$15 per acre, from dividing it into shares of less than fifty acres, forms no part of the act of 1820, ch. 191, and was purposely dropped by the legislature. *Ib.*
6. The objection that two of the heirs at law who are infants, have no part of the inheritance given to them until after the death of their mo-

PARTITION—*Continued.*

ther the widow, the parts allotted to them being encumbered with her dower for life, is a fatal objection to the return of the commissioners. *Ib.*

7. The right of election given to the eldest son by the act of 1820, ch. 191, is a valuable right, but has no existence and cannot be enforced unless the commissioners determine that the estate cannot be divided without loss and injury to all the parties, and their return to this effect is confirmed by the court. *Ib.*
8. Where lands are divided in specie under the act of 1820, the commissioners have no power to assign the widow a portion of the land, *in fee*, equal to her dower in the whole, for this would be in effect making her a co-heir. *Ib.*

See PRACTICE IN CHANCERY, 7.

HUSBAND AND WIFE, 2.

PARTNERSHIP, PARTNERS.

1. A receiver will not be appointed upon the application of the representatives of the deceased partner against a surviving partner, unless the latter has been guilty of mismanagement and improper conduct. *Walker, adm'r of House vs. House.*
2. If both parties are dead, and the representatives of one institute a suit for an account against the representatives of the other, the court will, as a matter of course, appoint a receiver. *Ib.*
3. Where both parties are alive, and either has a right to dissolve the partnership, and the agreement between them makes no provision for closing up the concern, equity will, as of course, appoint a receiver if they cannot arrange the matter between themselves. *Ib.*
4. Each partner has an equal right to the possession of the partnership effects, and to collect and apply them in satisfaction of the debts of the firm. *Ib.*
5. The surviving partner has, by law, a right to the custody, care, and management of the joint estate, and a court of equity will not take the business of settling it up from him, and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct. *Ib.*
6. The surviving partner alone can sue or is suable at law upon claims due to and by the firm, the executor of the deceased having a right to insist upon the application of the joint property to the payment of the joint debts, and a division of the surplus. *Ib.*
7. If the surviving partner does not, within a reasonable time, account with the executor of the deceased, and come to a settlement with him, equity will interfere in an effectual way, to prevent injury to the representative of the deceased. *Ib.*
8. A court of equity will interfere, by the appointment of a receiver, with much less reluctance in the case of a partnership which has closed, than during its continuance. *Ib.*
9. In the case of a subsisting partnership, the court will never, on motion,

PARTNERSHIP, PARTNERS—*Continued*

- appoint a receiver unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Ib.*
10. Upon the death of one partner, it is the duty of the survivor to cease carrying on the business of the firm; his authority from that time is limited to winding up the affairs of the partnership, and to this end he may receive the debts due to, and apply the assets in discharge of the debts due by it. *Ib.*
 11. If he passes this limit, and undertakes to carry on the partnership business, or engage in new transactions, contracts, or liabilities, it is an abuse for which the court would be justified in appointing a receiver. *Ib.*
 12. The death of one partner puts an end to the partnership from the time of the occurrence of that event, whether known or unknown, or whether third persons have or have not notice thereof, and any new obligations bearing the partnership signature are not binding on the firm, but only on the surviving partner who signed them. *Ib.*
 13. The executor of a deceased partner has the right to insist that the value of the property of the firm shall be ascertained by a sale; the survivors have no right to take the whole property, do what they please with it, and settle with the executor upon a calculated value. *Ib.*
 14. Where an injunction is granted to preserve the property of a partnership from waste, until the application for a receiver can be heard, its continuance must depend upon the fate of the latter application; if the receiver be refused, the injunction must be dissolved. *Ib.*
 15. The appointment of a receiver does not merely carry with it an authority to sell the remaining stock of the firm, but confers the general power to take possession of its books, papers and effects, to receive its outstanding debts, and wind up its affairs. *Ib.*
 16. Such appointment completely displaces and supersedes the authority of the surviving partner, putting the receiver in his place, and clothing him with all the rights and duties which the law confided to such partner. *Ib.*
 17. The rule that the carrying the stock of an old firm into the business of a new one, entitles a partner of the old firm to treat the new trade as a continuance of the old business, and to claim such proportion of the profits as he might have claimed if the old trade had been continued, is not a universal one. *Hyde vs. Easter*, 80.
 18. The right to share in the profits resulting from a continuation of the business after dissolution, is founded upon the exposure of the property of the partner who goes out to the risk of the new business, and if such partner has no property to be thus exposed, the principle cannot apply. *Ib.*
 19. This rule is not applicable to the present case, where the *whole capital* was furnished by the continuing partners, and the out-going partner had at the time of dissolution drawn more than his share of the profits, and the written articles of co-partnership provided for its termina-

PARTNERSHIP, PARTNERS—Continued.

tion in various contingencies in precise terms, and the partnership was in fact dissolved in exact conformity with the articles. *Ib.*

20. Upon a bill by a partner for an account of the partnership affairs, a party, not a partner in the firm, cannot be called to account in the capacity of a partner, and he may demur to the bill for making him a party. *White vs. White*, 418.
21. But if one of the partners has transferred his interest in the partnership to a third party, such party may be called upon to account for the affairs of the firm in connection with the partners, and is a necessary party to a bill calling for a settlement of the partnership. *Ib.*
22. The allegation that one of the partners "is about to receive, if he has not already done so, a large sum from J. W. and H. W. or one of them as a consideration for arresting proceedings against them, and for a transfer of all his interest in the partnership," is too uncertain to make it necessary that H. W. who was not a partner, and but for this alleged transfer had no interest in the litigation, should be required to answer. *Ib.*

PART PERFORMANCE.

See ANTENUPTIAL SETTLEMENT, 2.

PRACTICE.

See LAND OFFICE FOR PRACTICE THERE.

PRACTICE IN CHANCERY.

PRACTICE IN CHANCERY.

1. Those who make the motion to have money brought into court, must show that they have an interest in the sum proposed to be called in, and that he who holds it in his possession, has no equitable right to it whatever, and the facts on which these positions are based must be found in the case as it then stands, either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings. *Hopkins vs. McElderry*, 23.
2. An answer exhibited accounts, showing a balance due complainant, which defendant says he was willing to settle, but the former refused to receive, and filed his bill, and the defendant believed, and still believes, that balance to be too large, and insists that he is now entitled to have certain sums credited with which he had not been credited in the accounts. *Held*—
That these admissions were not sufficient to authorize an order to bring the balance into court. *Ib.*
3. It must appear to the Chancellor that *all* the parties interested will be benefited by selling the property, before a decree for a sale can be passed under the Act of 1785, ch. 72, sec. 12. *Watson vs. Godwin*, 25.
4. The jurisdiction of the court cannot be sustained, unless the bill alleges that it will be for the interest and advantage of all parties interested that the land should be sold. *Ib.*
5. Making the infants complainants, does not dispense with the necessity of proof in support of the allegation that it will be for their interest to have the land sold. *Ib.*

PRACTICE IN CHANCERY—*Continued.*

6. Neither the answer of the infant, nor the answer of adult defendants confessing the fact, is evidence to affect the infant. *Ib.*
7. A bill for a sale under this Act may, consistently with the practice of the court, be converted by amendment into a bill for a partition. *Ib.*
8. In the case of a subsisting partnership, the court will never, on motion, appoint a receiver unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Walker, adm'r of House, vs. House, 39.*
9. Where an injunction is granted to preserve the property of a partnership from waste, until the application for a receiver can be heard, its continuance must depend upon the fate of the latter application; if the receiver be refused, the injunction must be dissolved. *Ib.*
10. Where an order appointing a special Auditor required him, before acting, to take an oath for the faithful performance of the duties of his office, it must appear in his report that he did take the oath; otherwise, his proceedings are wholly irregular, and the accounts stated by him cannot furnish the foundation of a decree. *Ib.*
11. Mere inadequacy of price in a chancery sale, unless so gross and inordinate as to furnish, *per se*, evidence of fraud or misconduct on the part of the trustee, is not sufficient cause for setting the sale aside or refusing its ratification. *House vs. Walker et al, 62.*
12. If a creditor is pursuing two remedies when only one is open to him, chancery may, upon application, compel him to elect, but until this is done, his pursuit of both will not deprive him of either. *Gibson vs. Finley, 75.*
13. A writ of sequestration was laid in the hands of a party who denied that the money belonged to the party against whom the writ issued, and set up a deed from such party, conveying the *choses in action* to him in trust, and his proceedings in the Superior Court of Baltimore city for the administration of the trust. **HELD—**
That under these circumstances, it would be wrong in this court to authorize the institution of proceedings at law or in equity to enforce the sequestration. *Keighler vs. Nicholson, 86.*
14. If the Superior Court had jurisdiction over the subject matter of the trust, however irregular the proceedings may have been, they cannot be regarded as *coram non judice* and void, nor can the irregularities be revised by this court. *Ib.*
15. The decision of a court of competent jurisdiction, when coming incidentally in question or offered as evidence of title in another court, is conclusive of the question decided, no matter how irregular or informal the proceedings may be, or what mistakes or errors the court may make in the matter adjudicated. *Ib.*
16. An order referring the cause to the Auditor, with directions to report the annual loss sustained by the plaintiff for the land claimed by him as embraced within the true location of his bond of conveyance and withheld by the defendant, is not a final adjudication that he is entitled to such land; it does not so settle the rights of the parties that an appeal would lie from it. *Smallwood vs. Hutton, 95.*

PRACTICE IN CHANCERY—*Continued.*

17. Where testimony taken under a commission has been returned and filed in court for more than eight months, and been made the foundation of the Auditor's report, to which report exceptions were filed, and which was submitted for final decision, it is too late for one of the defendants, who was examined as a witness, to ask that the commission be remanded upon the ground that the commissioner had made mistakes in writing down his testimony. *Tolson vs. Tolson*, 119.
18. Exceptions to such testimony, upon the ground that the parties had no notice that the defendant was to be examined as a witness, and that they, therefore, had no opportunity of cross-examination, will not be sustained, if they had notice of the time and place of the execution of the commission. *Ib.*
19. The omission to procure the previous order of the court for the examination of a defendant as a witness, is a mere irregularity, and when it is apparent no substantial injustice has been inflicted upon the opposite party by denying him the benefit of a cross-examination, and that delay and injury will be visited upon the party relying upon the proof, an objection thereto on this ground ought not to prevail. *Ib.*
20. The order for the examination of a party, as a witness, is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in. *Ib.*
21. A bill of review for new facts or newly discovered facts, must aver that such facts came to the knowledge of the complainant within nine months prior to the filing of his bill. *Hitch vs. Fenby*, 190.
22. Between the same parties, and for the same matters, a new original bill cannot be brought after a decree has made in a cause and enrolled, unless it was obtained by fraud. *Ib.*
23. A decree was passed in 1841 for the sale of certain mortgaged property to pay a balance claimed in the bill to be due on the mortgage debt, which sum was admitted by the answer of the defendants *under oath* to be due. Seven years afterwards, the defendants filed their bill to open this decree upon the ground that it was passed in pursuance of an agreement as a mere security for any balance that might be found due on settlement of their mutual dealings, and then charging usury and other objections against complainant's claim. **Held—**
 - 1st. That after such lapse of time, it would require a very strong and clear case to justify the interference of the court to prevent the alleged fraudulent and oppressive use of this decree.
 - 2d. Not having set up the defence of usury at the time the decree was passed, although he was well aware of the facts upon which the charge is based, and having offered no satisfactory excuse why he did not take the defence then, he cannot be allowed now to open the decree to let in this defence. *Ib.*
24. If a defendant, having the means of defence in his power in an action against him at law, omits to use them and suffers a recovery against him, he is precluded from asking relief in chancery in relation to the same matter. *Ib.*

PRACTICE IN CHANCERY—*Continued.*

25. In equity as at law, parties are required to use due and reasonable diligence, and they will not be permitted to unsay at a future time what they have not only once said, but sworn to. *Ib.*
26. Upon a supplemental bill, in the nature of a bill of review, the question always is, not what the plaintiff knew, but what, using due diligence, he might have known. *Ib.*
27. Where a fund is in court for distribution among creditors, the practice of the court is to allow creditors to come in at any time before a distribution has been actually made. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
28. So long as the fund is under the control of the court, it will let a creditor in who has been guilty of no negligence, and if necessary send the case to the Auditor to have a new account stated at his expense, notwithstanding notice to creditors has been duly given. *Ib.*
29. But where a creditor has been notified, and a reasonable time allowed him to support his claim by proof, and he fails to do so, an account rejecting his claim, if ratified, will not be opened at his instance to allow him to produce further proof, though the fund is still in the hands of the trustee. *Ib.*
30. Where an order has been passed directing the Auditor to state a *final account*, still, if the fund has not been parted with by the court, creditors who had not come in at the period of the passage of such order will be allowed to do so, but new proof will not, after such order, be allowed in support of claims already filed. *Ib.*
31. After an appeal is taken, and an appeal bond executed and approved, no step in the cause can be taken which by any *possible contingency* can prejudice the appellant. *Ib.*
32. It is an established rule of the Chancery Court that the statute of limitations runs against a claim or debt down to the time it is exhibited. *Ib.*
33. An order distributing a fund among a certain class of creditors and excluding others, was appealed from by one of the parties whose claim had been admitted to a dividend, but those excluded did not appeal. **HELD—**
That after such appeal taken and bond given, the court cannot order the dividend allowed to one of the creditors not appealing to be paid to him. *Ib.*
34. The court has the power to direct a fund in court to be invested pending an appeal, notwithstanding some of the parties interested in the fund may refuse their assent to such investment. *Ib.*
35. The answer of an infant by his guardian is not evidence against him, and the necessity of establishing the case as stated in the pleadings by proof is not obviated by making the infant a plaintiff. *Benson vs. Wright et al*, 278.
36. Where a creditor omitted to furnish proof of his claim in due time, having acted upon information derived from the receiver that his

PRACTICE IN CHANCERY—*Continued.*

claim would be allowed, and the fund was still under the control of the court, it was **HELD**—

That he should be allowed to prove his claim and receive his proportion of the dividends. *Abbott vs. Steam Packet Co.*, 310.

37. It is the duty of this court if suitors are misled by its agents, however innocently, to repair the injury if it can be done without prejudice to the ascertained rights of others. *Ib.*
38. A defendant to a creditor's bill, though he does not in his answer distinctly allege himself to be a creditor, and though he asks in his answer, to be dismissed with costs, may still after decree come in upon the fund as a creditor. *Gibbs vs. Cunningham*, 322.
39. As a general rule, if the infirmity of the plaintiff's case appears upon the face of his bill, the defendant may rely upon it at the hearing, no matter how imperfect, or what the character of his answer may be, and it is only with respect to some defences given by statute that a different rule prevails. *Ib.*
40. Proof taken under an *ex parte* commission cannot be read against defendants who answered an original bill, though they failed to answer a bill of revivor in the same case and an interlocutory decree was passed against them for such default. *Kerr vs. Martin*, 342.
41. The process of *subpœna scire facias* is the proper and appropriate proceeding to revive a decree which has abated by death, or where a female complainant has married, or the decree has become dormant by lapse of time. *Matthews vs. Merrick*, 364.
42. The fact that complainant has parted with his title to the land since the filing of the answer, cannot be brought forward by the defendant by a supplemental answer; the proper mode is to file a bill in the nature of a supplemental bill, which is in the nature of a plea, *puis darrien continuance*, at common law. *Pue vs. Pue*, 386.
43. Where a claim against the personal estate is disputed by the administrator, and the Orphans Court allow a reduced amount, and both parties acquiesce, the claimant cannot as against the proceeds of the real estate, claim more than was allowed against the personal estate. *Shepherd vs. Bevans*, 408.
44. A final order upon a petition asking the defendant to bring money into court for the purpose of investment, cannot be passed without notice to, or hearing of, the opposite party who has answered the petition, and objected to the application. *Brooks vs. Dent*, 473.
45. A decree to account against an executor or administrator, either separately for the suing creditor, or specially on behalf of himself, and all other creditors is a decree for the benefit of all the creditors, and in the nature of a judgment for all. *Ib.*
46. From the date of a decree to account upon a creditor's bill against an administrator or executor, and on a due disclosure of assets, an injunction will be granted on the motion of either party to stay all proceedings of any of the creditors at law. *Ib.*

PRACTICE IN CHANCERY—*Continued.*

47. An order confirming an Auditor's report, is an order in the nature of a final decree. *Wayman vs. Jones*, 500.
48. To a bill for an injunction, restraining execution of a judgment at law, the defendant filed a general demurrer, which was overruled by the Chancellor, and the injunction made perpetual; upon appeal, this order of the Chancellor was reversed, and the cause remanded for amendment in order to make necessary parties. **HELD—**

That when the bill is amended, the defendant will have a right to answer it. *Iglehart vs. Mayer*, 514.

49. Where negro slaves are manumitted by deed or will, and the real and personal estate of the manumittor or testator are insufficient for the payment of his debts, his creditors may file a bill in equity making the manumitted slaves and all persons interested parties, and have an account taken of all the property of the deceased, and if it shall prove insufficient to pay his debts, the manumitted slaves may be decreed to be sold for that purpose, either for life or a term of years, as the circumstances or the nature of the case may require. *Allein vs. Hutton*, 537.
50. A trustee or his administrator may be called upon *by petition* to bring the trust fund into court, and to account therefor; and the administrator may also be required in such proceeding, to account for the personal estate of the trustee *Maddox vs. Dent*, 543.
51. A trustee was appointed to sell the real estate of a deceased party, for the payment of his debts in 1830, and made and reported the sale which was affirmed, *nisi*, in 1831, and in 1842 he was called upon by the heirs at law of the deceased to account for the purchase money. **HELD—**

That after this lapse of time the trustee must not only be presumed to have received the purchase money, but is responsible for it whether he received it or not. *Ib.*

52. Upon a creditor's bill, the claim of the complainant creditor as stated in his bill, is ascertained and established by the decree. *Ib.*

See SET-OFF.

INSOLVENT DEBTORS, 1, 2, 5.

FRAUDULENT CONVEYANCES, 1.

RECEIVERS.

PARTNERSHIP, PARTNERS.

LUNATIC LUNACY.

ASSIGNMENT IN FAVOR OF CREDITORS, 4.

SEQUESTRATION.

PARTITION.

SPECIFIC PERFORMANCE.

TRUSTEE AND CESTUI QUE TRUST.

COUNSEL FEES.

LIMITATIONS.

ALIMONY, 9.

PRACTICE IN CHANCERY—*Continued*

SALES BY TRUSTEES.

INJUNCTION.

MISTAKE.

JUDGMENTS, 3.

ATTACHMENT.

WILL AND TESTAMENT, 20

ORPHANS COURT, 2, 9.

DOWER, 4.

PRESCRIPTION.

See WAYS, RIGHT OF, &c., 1, 4, 5

PRESUMPTIONS OF LAW AND OF FACT

See SALES BY TRUSTEES, 3.

PRACTICE IN CHANCERY, 51.

PRIMAGE.

1. Primage is an allowance by the shippers to the master for his care bestowed upon their property on board the vessel, with which the owner of the vessel has no concern, and which the master receives to his own use, unless he has otherwise agreed with the owners. *Peters vs. Speights*, 375.

PROMISSORY NOTES.

See CROSS PAPER.

EVIDENCE, 4.

PURCHASES.

See TRANSFER OF STOCK, 1, 2

RECEIVERS.

1. A receiver will not be appointed upon the application of the representatives of the deceased partner against a surviving partner, unless the latter has been guilty of mismanagement and improper conduct. *Walker, adm'r of House vs. House*, 39.
2. If both partners are dead, and the representatives of one institute a suit for an account against the representatives of the other, the court will, as a matter of course, appoint a receiver. *Ib.*
3. Where both parties are alive, and either has a right to dissolve the partnership, and the agreement between them makes no provision for closing up the concern, equity will, as of course, appoint a receiver if they cannot arrange the matter between themselves. *Ib.*
4. The surviving partner has, by law, a right to the custody, care and management of the joint estate, and a court of equity will not take the business of settling it up from him, and appoint a receiver, unless confidence be destroyed by his mismanagement or improper conduct *Ib.*
5. A court of equity will interfere, by the appointment of a receiver, with much less reluctance in the case of a partnership which was closed, than during its continuance. *Ib.*

RECEIVERS—Continued.

6. In the case of a subsisting partnership, the court will never, on motion, appoint a receiver unless it appears that the plaintiff will be entitled to a dissolution at the hearing. *Ib.*
7. The appointment of a receiver does not merely carry with it an authority to sell the remaining stock of the firm, but confers the general power to take possession of its books, papers and effects, to receive its outstanding debts and wind up its affairs. *Ib.*
8. Such appointment completely displaces and supersedes the authority of the surviving partner, putting the receiver in his place, and clothing him with all the rights and duties which the law confided to such partner. *Ib.*
9. It has not been the uniform practice of the court to allow receivers of insolvent corporations and private partnerships a commission of eight per cent. but the allowance in such cases has been controlled by the circumstances of each case rather than by any fixed, invariable principle or analogy. *Abbott vs. Steam Packet Co.*, 310.
10. As a general rule governing all cases not attended with peculiar circumstances requiring an augmentation, the allowance to receivers of insolvent corporations or private partnerships will be regulated by the general rule allowing commissions to trustees. *Ib.*

See LUNATIC LUNACY, 7, 8, 9.

RECITALS.

See LAND OFFICE, 1.

RELATION, DOCTRINE OF, &c.

See LAND OFFICE, 4, 5.

RESULTING TRUSTS.

1. A trust which results to the party who pays the consideration money for lands, is expressly exempted from the operation of the statute of frauds, and the fact of payment may be established by parol proof. *Faringer vs. Ramsay & Ehrman*, 33.
2. But though the fact of payment may be shown by parol proof, the evidence must be so strong as to leave no reasonable doubt upon the subject, because of the danger of this description of proof, not only as tending to perjury, but on account of the insecurity to which its introduction exposes the paper title. *Ib.*

SALE OF VESSEL IN FOREIGN PORT.

1. The complainant and defendant were joint owners of a vessel, which sailed from Baltimore to San Francisco, the former owning three-fourths, and the latter one-fourth thereof. The defendant was also the master of the vessel, and when he sailed from Baltimore held a power of attorney from complainant to sell his share when she arrived in San Francisco. This power and authority the complainant afterwards, and before the vessel arrived at her destination, revoked and transferred the same to other parties, his agents in San Francisco. These

SALE OF VESSEL IN FOREIGN PORT—*Continued.*

agents with the concurrence of defendant, offered the vessel at public auction upon her arrival in San Francisco, and the defendant became the purchaser. **HELD—**

That under all the circumstances of the case the relation in which the parties stood at the time of the sale, did not preclude the defendant from becoming the purchaser of the vessel, the relation of trust and confidence between them having been destroyed by the complainant himself, by confiding the power to dispose of his interest in her to other parties. *Peters vs. Speights*, 375.

2. The purchase of a ship in a foreign port by the master is generally to be considered as made for the benefit of the owners if they elect so to regard it; the incapacity of the master to purchase in such cases, arises from the relation of trust and confidence which exists between him and the owners. *Ib.*

SALES BY TRUSTEES.

1. Mere inadequacy of price in a chancery sale, unless so gross and inordinate as to furnish, *per se*, evidence of fraud or misconduct on the part of the trustee, is not sufficient cause for setting the sale aside or refusing its ratification. *House vs. Walker et al*, 62.
2. The omission to make a prior incumbrancer a party, though it might possibly be error, for which the decree would be reversed on appeal, will not render the sale void. *Speed vs. Smith*, 299.
3. A mortgage was executed by an insolvent, and his trustee, nearly twelve years after the former, petitioned for the benefit of the insolvent laws, upon which a decree for the sale of the mortgaged premises was passed. **HELD—**

That an objection to the sale upon the ground of the incapacity of the mortgagors to execute the mortgage cannot be sustained, the presumption being after such lapse of time and in the absence of proof to the contrary, that no debts due by the insolvent, at the time of his application, remain unpaid. *Ib.*

4. In the absence of any misleading representation by the trustee of the condition and value of the property, an objection by the purchaser that it sold for more than its worth, cannot be sustained, the property having been open to his examination. *Ib.*
5. If the trustee makes any promise or representation to the bidders, that the estate shall be, or is, clear of all incumbrances, or that the title is better or different from that which would flow from the proceedings, which promise or representation cannot be complied with, or turns out to be erroneous, the sale will be set aside. *Ib.*
6. The advertisement stated that property sold was subject to a ground rent of "only ten dollars." The exceptant offered in evidence a lease of property of which that sold was a part, executed in 1796, for the yearly ground rent of twenty dollars. Several subsequent conveyances of the property sold were shown, and that the ground rent paid upon it had been \$10, and no proof was offered that this particu-

SALES BY TRUSTEES—*Continued.*

lar property had, since the lease, been held liable to the rent of \$20 therein reserved. **HELD—**

That an objection to the sale on this ground could not be sustained, the Chancellor being of opinion that there had been an apportionment of the original ground rent acquiesced in by those who claim under the original lease. *Ib.*

7. The trustee stated, at the sale, that there were claims against the property, but that he would retain a sufficient amount of the purchase money to pay them, and that the purchaser would get a good title, which statement the purchaser heard. **HELD—**

That the pendency of a suit to foreclose a prior mortgage on the property was no sufficient ground to set the sale aside, but the court will see that the offer of the trustee to clear up the title is performed, and that a sufficient amount is retained out of the proceeds of sale for that purpose. *Ib.*

8. The court, in all sales under its decrees, is itself the vendor, acting through the instrumentality of its trustee or agent, for the benefit of the parties concerned. *Ib.*
9. A sale is not void because the trustee may have omitted to give bond as required by the decree before it was made. *Ib.*
10. A private sale, if decreed advantageous, may be ratified by the court, though the trustee was directed by the decree to sell at public sale. *Ib.*
11. In the execution of decrees for the sale of property, though this court employs a trustee, that officer is its agent, the court itself being the vendor acting through the instrumentality of its agent. *Hurt vs. Stull*, 391.

See **INSOLVENT DEBTOR**, 6.

SALE OF LANDS UNDER ACT OF 1785, CH. 72.

See **PRACTICE IN CHANCERY**, 3, 4, 7.

SEAMEN.

1. As a general rule, a seaman is entitled to receive the whole of his stipulated wages for the entire intended voyage, if he has faithfully performed his duty, and no disaster has rendered his services unproductive to his employer, but this rule as a general thing is inapplicable to the master. *Peters vs. Speights*, 375.

SEPARATE ESTATE OF MARRIED WOMEN.

See **MARRIED WOMEN**.

SEQUESTRATION, WRIT OF, &c.

1. Where a *chose in action* is in the hands of a third party, who is willing to abide by the order of the court, or who admits it to belong to the person against whom the writ of sequestration has issued, the court will consider it liable to sequestration, and will order it to be paid in to court. *Keighler vs. Nicholson*, 86.

SEQUESTRATION, WRIT OF, &c.—*Continued.*

2. But where the amount or title of the party whose property is sequestered, is disputed by the person holding the *choses in action*, the court cannot make an order upon him ; it is only in a *clear and simple case* that a sequestration can be enforced by order. *Ib.*
3. A writ of sequestration was laid in the hands of a party who denied that the money belonged to the party against whom the writ issued, and set up a deed from such party, conveying the *choses in action* to him in trust, and his proceedings in the Superior Court of Baltimore city for the administration of the trust. *HELD*—
That under these circumstances, it would be wrong in this court to authorize the institution of proceedings at law or in equity to enforce the sequestration. *Ib.*

SLAVES.

See NEGROES AND SLAVES.

SPECIFIC PERFORMANCE.

1. A much weaker case will constitute a good defence than would be required if the parties were complainants, asking the active interposition of the court in their favor ; they are not bound to make out a case which would entitle them to the specific performance of the agreement set up in their answers. *Haines vs. Haines*, 133.
2. To constitute a valuable consideration, it is not necessary that money should be paid ; if it be expended on the property on the faith of the contract, it constitutes a valuable consideration. *Ib.*
3. Money expended in the improvement of land on the faith of the contract constitutes a consideration on which to ground a claim for specific performance. *Ib.*
4. A court of equity will not decree the specific performance of a mere voluntary agreement. *Ib.*
5. It is competent for a party in a court of equity to offer parol evidence of a mistake in a written agreement relating to lands, have it rectified, and then specifically executed as rectified. *Philpot vs. Elliott*, 273.
6. But before the agreement will be reformed and executed as reformed, the mistake, and the proposed correction, must both be made out in the clearest and most unequivocal manner. *Ib.*
7. Specific execution of contracts in equity is not a matter of absolute right, but of sound discretion in the court, and unless the court is satisfied, the application is fair, just, and reasonable in every respect, it will abstain from interfering. *Ib.*
8. There are many cases in which parol evidence at the instance of the complainant may be received to rectify a contract in writing, and in which the contract so rectified will be specifically executed. *Wood vs. Patterson*, 335.

See INADEQUACY OF PRICE, 2.

SET-OFF.

1. To authorize a set-off, either at law or in equity, the debt must be mu-

SET-OFF—*Continued.*

- tual, and due to and from the same persons in the same capacity. *Watkins vs. Zane*, 13.
2. The complainant cannot set-off a claim for professional services rendered the defendant and another *jointly*, or upon their joint employment, against a judgment at law in favor of defendant alone, against complainant and another. *Ib.*
 3. Claims due by a guardian for property for which he received from the mother of his wards, cannot be set off against claims due to the guardian by the estate of their father. *Gibbs vs. Cunningham*, 322.
 4. There must be reciprocity and mutuality in the right of set-off, and the demands on the one side and the other must be in the same right. *Ib.*

SETTLEMENTS.

1. A settlement between parties accompanied by a sealed obligation of one to pay the balance found due by the settlement, must be regarded as concluding all antecedent transactions between the parties, unless it can be shown by proof that it was founded upon mistake or was procured by fraud. *Brown vs. Stewart*, 368.

SETTLEMENTS—*Continued.*

See MISTAKE, 5, 6.

ANTENUPTIAL SETTLEMENT.

SLAVES.

See WILL AND TESTAMENT, 12, 13.

STATUTE OF FRAUDS.

See RESULTING TRUST, 1.

PARENT AND CHILD, 2.

ANTENUPTIAL SETTLEMENT, 1.

STOCK.

See TRANSFER OF.

SUBSTITUTION.

1. Where a mortgage was executed to secure the payment of certain promissory notes, to be made by the mortgagors, and endorsed by the mortgagees, and such notes were taken in exchange for those drawn by other persons. *HELD*—
That the holders of the notes so given in exchange are entitled to be substituted to all the rights of the makers thereof, to participate in the proceeds of the sale of the mortgaged premises. *Ohio Life Ins. and Trust Co. vs. Winn & Ross*, 253.
2. The principle of substitution places the substitute in *all respects* in the place of the party for whom he is substituted. *Ib.*

See LIEN, 2.

LIMITATIONS, 4.

SUPPLEMENTAL BILL.

See PRACTICE IN CHANCERY, 26.

TRANSFER OF STOCK.

1. The stockholders of a theatre appointed six persons trustees for its management, by whom the transfer books were kept, and in 1841, two shares standing in the name of one of the stockholders was transferred by the firm of which he was a member to a *bona fide* purchaser for value without notice, in whose name they remained until 1848, (he in the mean time having transferred them to parties who retransferred them to him,) when objection was made by the other stockholders to the title of such purchaser. **HELD—**

That the trustees were the trustees of the stockholders, and if they suffered the stock to be transferred to a *bona fide* purchaser without notice, by a person not having authority to make the transfer, the loss, in a contest between such purchaser and the stockholders, must fall upon the latter. *Cohen vs. Gwynn*, 357.

2. A memorandum made on the transfer book after the purchase of the stock by a *bona fide* purchaser, showing the arrangement under which certain of the stock was transferred, cannot affect such purchaser with notice of this arrangement. *Ib.*

TRESPASS.

See INJUNCTION, 3.

TRUSTS.

See TRUSTEE AND CESTUI QUE TRUST.

RESULTING TRUSTS.

WILL AND TESTAMENT, 17.

TRUSTEE AND CESTUI QUE TRUST.

1. The recommendations of parties with reference to numbers, amount of interest and reasons assigned, will always be attended to upon the question of selecting a trustee, though the court is not bound by such recommendations. *McKim vs. Handy*, 228.
2. Where trustees are entitled to costs out of the fund, they will be taxed as between solicitor and client, and if a trustee finds it necessary to employ counsel as to the proper management of the estate, he will be allowed such reasonable fees as he may have paid, but counsel fees paid by the successful party, in a contest as to who shall administer the trust, will not be allowed out of the fund. *Ib.*
3. A testatrix by her will executed in 1812, bequeathed her property, real and personal, in trust, for the use of her granddaughter during her natural life, and after her death the same with its increase, to be divided generally among her children. The trustee named in the will declining to act, the Chancellor appointed trustees in 1815, who in 1827 were discharged, and two of the *cestui que trusts* were appointed trustees in their place, and in the same year a decree was passed for a sale of some of the negroes belonging to the estate, and the trustees gave bond for the execution of the trust. The granddaughter died 1846, and in the same year two of the *cestui que trusts* filed their bill for a settlement of the estate and distribution of the fund. **HELD—**

TRUSTEE AND CESTUI QUE TRUST—*Continued.*

That in the distribution of the fund, under *this bill*, the accounts of the trustee, who sold some of the negroes under the decree of 1827, and appropriated the proceeds to his own use, could be inquired into and settled, and the amount so appropriated by him, with interest, deducted from his share of the fund. *Higgins vs. Higgins*, 238.

4. There is but one trust in this case, though it has been cut up into several distinct proceedings, and now, when a final disposition of the whole fund is about to be made, it is indispensable to justice that all the proceedings should be brought together by an order of consolidation. *Ib.*
5. The trustee, acting under the decree of the Court of Chancery of 1827, is entitled to a commission of *seven and one half per cent.* on the income of the real and personal estate. *Ib.*
6. A trustee for the investment of certain trust funds, for the benefit of certain *cestui que trusts*, paid a portion of the trust money into the Court of Chancery under its sanction, which remained there for some time uninvested. *HELD—*

That he was not responsible for interest on the sums so paid into court for the time during which they remained uninvested. *Wayman vs. Stockett*, 495.

7. Upon petition of a *cestui que trust*, the Chancellor passed an order directing certain mortgages belonging to the trust estate to "be forthwith closed," and that the *cestui que trust* "have leave to cause a suit or suits to be instituted for that purpose, in the names of the trustees, in such manner as may be most proper, necessary and beneficial to him." *HELD—*

That under this order, the *cestui que trust* might file a bill to foreclose a mortgage executed by one of the trustees to the trust estate, and was not confined to a proceeding by way of petition in the original cause. *Ib.*

8. If any portion of the trust fund has been misapplied or destroyed, it is the duty of the trustee to communicate the fact to the court, and ask its sanction of the measures adopted by him to obtain redress. *Wayman vs. Jones*, 500.
9. If a trustee acting on his own responsibility, receives any property from the party misapplying the trust fund, either in payment or as security for the payment of the amount due the fund, he must put the transaction in such a position that its character may be easily understood, and any bad consequences flowing from the obscurity of the transaction, must fall upon him. *Ib.*
10. Though a portion of the trust fund is entrusted to the supervision and control of one of two trustees, yet if any fact endangering its safety comes to the knowledge of the other trustee, he is bound to see to its security and communicate the fact to the court and his co-trustee. *Ib.*

TRUSTEE AND CESTUI QUE TRUST—*Continued.*

11. If a trustee acting upon his own discretion, makes an investment of trust funds without the sanction and approbation of the court, he will be responsible for any losses thereby incurred. *Ib.*
12. An order passed by the court upon petition, of one of the *cestui que trusts*, directing the trustee to account for a portion of the trust fund, and specifying to some extent the responsibility incurred by him, does not finally determine any right and is not conclusive on any of the parties to the case. *Ib.*
13. A trustee or his administrator may be called upon *by petition* to bring the trust fund into court, and to account therefor; and the administrator may also be required in such proceeding, to account for the personal estate of the trustee. *Maddox vs. Dent*, 543.
14. A trustee was appointed to sell the real estate of a deceased party, for the payment of his debts in 1830, and made and reported the sale which was affirmed, *nisi*, in 1831, and in 1842 he was called upon by the heirs at law of the deceased to account for the purchase money,
HELD—

That after this lapse of time the trustee must not only be presumed to have received the purchase money, but is responsible for it whether he received it or not. *Ib.*

See SALES BY TRUSTEES.

WILL AND TESTAMENT, 17, 20.

VENDOR'S LIEN.

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USURY.

Prior to the act of 1845, ch. 352, the plea of usury by the mortgagor or his alienee to a bill of foreclosure by the mortgagee would have been a full and complete defence. *Hitch vs. Fenby*, 190.

See PRACTICE IN CHANCERY, 23.

VENDOR, VENDEE.

See AGREEMENTS, &c., 1, 3.

VENDOR'S LIEN.

1. The equitable lien held by the court for the payment of the purchase money of land sold under its decree, cannot be enforced by a trustee who has assigned the bonds given for its payment, whether the assignment was or was not made, with the sanction of the court. *Hayden vs. Stewart*, 280.

VENDOR'S LIEN—Continued.

2. The assignment of a bond given for the purchase money of land without recourse, extinguishes the vendor's lien, because so far as he is concerned, it amounts to a payment and satisfaction of his claim. *Ib.*

VOLUNTARY AGREEMENTS.

See SPECIFIC PERFORMANCE, 4.

WAYS, RIGHT OF, &c.

1. A private right of way over the lands of another must be founded either on grant or by prescription which supposes a grant. *Pue vs. Pue*, 386.
2. A user of a right of way for twenty years, exercised adversely and without anything to qualify it, will afford sufficient ground for the presumption of a grant. *Ib.*
3. But if the enjoyment can be referred to the leave or favor of the party over whose lands the right of way is claimed, or can be placed upon any other footing than a claim or assertion of right, it will repel the presumption of a grant. *Ib.*
4. A right of way once established by prescription or by grant, cannot be extinguished by a parol agreement. *Ib.*
5. But where an attempt is made to make out a title by prescription founded upon an adverse and uninterrupted user for a series of years, it is competent to the defendant to prove by parol that the user was the result of his leave and favor, and not of a claim of right in the other party. *Ib.*

WIFE'S EQUITY.

See HUSBAND AND WIFE, 1.

WILL AND TESTAMENT.

1. A testatrix devised her real estate to her executor, in trust, to sell the same and invest the proceeds to pay the legacies and annuities in her will. She then bequeathed to her sister an annuity of one hundred dollars during her life; to her niece, fifty dollars per annum during her life; to each of the children of her said niece now living, or hereafter to be born, one hundred dollars per annum, payable as they respectively attained the age of five years, and to continue until they were old enough to be put out to trades. She also gave other pecuniary legacies to the same children as they respectively arrived at age or married. The interest of the trust fund was inadequate to pay these annuities. **HELD—**

That they could not be paid out of the *principal* of the estate.

Trust estate of Jane Blake, 64.

2. A party, by a declaration of trust, settled upon his son and daughter certain bank stock, which he declared he would hold in trust for them, the dividends to be paid to them equally, share and share alike, and on the death of the daughter, one-half to be transferred to her children, and on the death of the son, the whole to be transferred to his daughter and her children, and subsequently made his will, devising

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certain property, including this stock, in trust for his son, and expressed a desire in the will that the son should elect to take thereunder. He also gave to his wife certain property for life, confiding to her the care and maintenance of his son, and after her death, he gave his son in addition, a life annuity of \$600. The son elected to take under the will. **HELD—**

- 1st. That by this election, the declaration of trust, so far as the son is concerned, is to be treated as a nullity, and the trust under the will extends to, and comprehends, the dividends upon the stock, which became due after the date of the will, as well as those which were declared previously.
 - 2d. That the trusts created by the will in favor of the son take effect immediately upon the death of the testator, and are not suspended until the death of the widow of the testator.
 - 3d. The will not having disposed of the portion of the stock given to the daughter and her children, and there being no expression in the will of the testator's wish that they should take thereunder, they are not required to elect to hold the stock under the will, or the declaration of trust. *Mayo vs. Mayo*, 103.
3. A will operates upon whatever *personal* estate the testator dies possessed of, whether acquired before or after the execution of the instrument. *Ib.*
 4. A testator confided to his wife, to whom he had given a large portion of his estate, the care and maintenance of his son, and after her death he charges upon his estate an annuity of \$600 per annum, and provides that this annuity, with all the other property given to his son by his will, should be held in trust by his executor "for the use and benefit of his son during his natural life," and declared "his intention" to be, to assure to him "an ample and *independent* support," so far as the law will allow. **HELD—**
That the income of the trust estate was to be paid over to the son during the life of the testator's widow, and not to accumulate during that time, and form part of the principal; it was not the testator's intention to give his son, during the life of his wife, a mere indefinite claim upon her for care and maintenance. *Ib.*
 5. A testator by his will, executed in 1832, in order to place his sons upon an equality with his daughters, gave to each a pecuniary legacy to be paid by his executors "by the sale of his bank or other stocks." **HELD—**
That this equality had reference to the state of facts existing at the date of his will, and no subsequent fluctuation in the value of the property which the testator may have previously given his children can influence this bequest, either to diminish or increase it. *Dugan vs. Hollins*, 139.
 6. A gift of a house to one of his sons subsequently to the date of the will, is not an ademption, *pro tanto*, of the pecuniary legacy given by the

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will; one of the exceptions to presumptive ademption is, where the testamentary provision and the subsequent advancement are not *ejusdem generis*. *Ib.*

7. These legacies to the sons are payable out of the personal estate alone, and that being insufficient, they have no right to resort to the real estate in the hands of the devisee. *Ib.*
8. A testator directed "his funeral expenses and debts to be paid out of whatever part of his estate his executors shall think proper."

HELD—

That if this clause confers upon the executors the power to sell the real estate, it only authorizes them to do so for the purpose of paying funeral charges and debts. *Ib.*

9. The real estate is never charged with the payment of legacies, unless the intention so to charge it is expressly declared, or is fairly and plainly to be inferred from the terms of the will. *Ib.*
10. A testator declared by his will, that if any claim was made against his estate on account of certain notes drawn by him in favor of his daughters or their husbands, his executors should charge the sums paid by his estate on account thereof to his daughters. These notes the testator paid in his lifetime, and lived more than two years thereafter without changing his will. HELD—

That the provision made in his will for his daughters could not be diminished on account of the payment of these notes. *Ib.*

11. A testator devised certain lands in trust for "the use and benefit" of his daughter during the life of her husband, directing the trustees not to pay the proceeds to him, but any "receipts or writings witnessing the payment of such proceeds or profits to his daughter shall be a sufficient discharge of said trustees." HELD—

That the daughter was entitled during the life of her husband to receive the proceeds of the trust estate, and having the power to receive, she had the correlative power to dispose of them, at least for the support of herself and children. *Gill vs. Clagett*, 153.

12. A testator devised a farm "with all the rest of his negroes, stock of every description and plantation utensils, in trust," that "the income arising therefrom" be applied to the benefit of his uncle and aunt during their lives, and then over. HELD—

That the increase of the female slaves born during the life of the uncle and aunt, did not belong to the legatees for life but pass to those entitled in remainder. *Holmes vs. Mitchell*, 162.

13. A testator by his will manumitted his negroes, and devised certain real estate to a trustee "in trust to be rented out by him, and the rents and profits to be received by him and annually paid to" said negroes, "or their order, attested by some justice of the peace," and directed the trustee, upon the death of any of these legatees to pay over "whatever property he shall then have, as trustee to the legal representa-

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tives and heirs at law of the deceased, unless the deceased shall make some other appointment by his last will and testament duly executed." He then gave the trustee the power to sell the lands, with the desire of the *cestui que trusts* of full age, and invest the proceeds in some safe securities for their benefit, but this power he revoked by a codicil, and expressed a desire that no part of the trust estate should be sold.

HELD—

That by this will the negroes had no power in their lifetime to make an absolute disposition of this property. *Robinson vs. Robinson*, 176.

14. In the judicial interpretation of wills, the intention of the testator, to be gathered from the entire instrument, must prevail, unless it violates some established principle of law. *Ib.*
15. A testator, by his will, executed in 1786, gave to his wife a legacy of £2250, and an annuity of "£500 during her natural life, to be secured to her out of the rents of his estate," and devised to his brother the residue of the estate, "after the above will is complied with." The legacy being unpaid and the annuity in arrear, a decree was passed in 1790, charging the rents of all the lands of the testator, with the payment of the annuity due and to become due, *in the first place*, and *after said payment*, declaring the reversion chargeable with the payment of the legacy. The property was subsequently sold, and the proceeds proved insufficient to pay the arrears of the annuity. **HELD—**

That both the legacy and annuity are by the decree of 1790, treated as a charge upon the real estate of the testator in the hands of his residuary devisee, and the same decree settles the question of priority of payment between the annuity and legacy by declaring that the former must *be paid first*. *Crabb vs. Moale*, 219.

16. A testator devised real and personal estate to certain trustees, "to them and the survivor of them, and the heirs, executors and administrators of the survivor" in trust "that the said trustees or the survivor of them, or the person or persons who may succeed them in the trust," may from time to time change the investments of the stocks and the proceeds thereof "with any accumulations of the fund generally," to reinvest, &c. **HELD—**

That it was the intention of the testator that the real and personal estate should remain in the same hands, and the trust was not transmitted to the executor of the surviving trustee, but the whole trust became vacant upon his death. *McKim vs. Handy*, 228.

17. A testator devised certain property in trust, and directed the trustee to pay to each of his grandchildren born and to be born, the sum of one thousand dollars, "if they live to attain lawful age." One of the female grandchildren died after attaining eighteen years of age, but before twenty-one. **HELD—**

That this legacy vested upon her attaining eighteen years of age, the intention of the testator being that the legacy should be paid

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to her when she was of *lawful age* to receive it, which, by the laws of this state, is eighteen years in the case of a female infant.
Ib.

18. A testator devised all his estate "both real and personal" to his wife for life, and after her death directed his executor to "sell his real estate and pay to each of his three grandchildren" \$1000 each, when they arrive at the age of twenty-one. **HELD—**

That this direction in view of a court of equity, operated a conversion of the real estate out and out into money. *Carr vs. Ireland*, 251.

19. A testatrix devised a portion of the residue of her estate to certain trustees in trust "for the use of the children of M. S., the children of W. B. and G. B., equally as tenants in common, their heirs and representatives forever." **HELD—**

That the children of M. S. and W. B., born *since* the death of the testatrix, are to be excluded from the benefit of this bequest, but all their children born prior to that period, and G. B. take *per capita*, and equally. *Benson vs. Wright et al*, 278.

20. A testatrix devised her estate, real and personal, to trustees in trust to "apply the rents and profits thereof to the support and maintenance of her daughter during her life, and to the support and maintenance, and education of her children," "and after her death in trust for her children, to be equally divided amongst them." The daughter, at the date of this will and death of the testatrix, had four children by her then husband, who died during the life of the testatrix. She subsequently married again, and had by her second husband, five children.
HELD—

1st. That under this will the children of the daughter by the second marriage, as well as those by the first, are entitled to maintenance and education out of the interest of the trust fund during the life of the daughter, and to a distributive share of the principal after her death.

2d. The provision for maintenance and education commences from the birth of each child or the death of the testatrix, and continues during its minority, or until its marriage, if a female, or the death of its mother.

3d. The representatives of such of the deceased children to whom none of the interest of the trust fund was paid for their support and maintenance, are entitled to an account for the sum which should have been paid to them.

4th. The trustee appointed under this will might have performed all the duties of the trust without an application to a court of equity.

5th. A decree of the Court of Chancery, passed under the act of 1785, ch. 72, sec. 4, appointing the trustee named in the will, trustee for the sale of the real estate devised by the will, invested him with all the power which he would have had under the will,

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and imposed upon him the same obligations by which he would have been bound by the will.

6th. The trustee having paid into court the proceeds of the real estate, in pursuance of the order of the Chancellor, he is not responsible afterwards to any person who may establish a claim to them, as he acted under the authority of a court of competent jurisdiction. *Conner vs. Ogle*, 425.

21. A testatrix, after bequest of some specific articles of plate, bequeathed as follow, "the rest of my plate I should wish to be divided among the children of my daughter, unless my trustees should think it most advisable to sell it for their use." **HELD—**

That the residue of the plate so bequeathed, vested immediately on the death of the testatrix in the children of her daughter then born, and the power to the trustees to sell does not extend to the death of the daughter, but must be exercised within a reasonable time ; but jewels cannot be deemed plate. *Ib.*

22. A testator devised all his estate, real, personal and mixed, to his brother in fee, "on those terms and conditions," viz. "after all my debts are paid, he is to call in two discreet persons to make an estimate of the real value of all my estate," and then adding to his own children two sons of the testator's deceased brother, and a son of his niece, he is to ascertain "what my estate will divide into," and pay to each of the three last named parties on their arrival at twenty-one "a sum that will put them each on a footing with his own children." **HELD—**

1st. That the estimate of his property is not to be made irrespective of the debts of the testator, but exclusive of them, and by accepting this devise, the testator's brother did not become personally bound to pay the legacies above directed, whether the estate was sufficient to pay its debts or not.

2d. The acceptance of this devise by the testator's brother, did not operate as an extinguishment of a debt due by the testator to him, and the legatees have no right to plead the statute of limitations against his claim, either as to the real or personal estate, he alone having the right to interpose this plea to claims against the testator. *Spencer vs. Spencer*, 456.

23. As a general rule, where lands are devised charged with the payment of a legacy, and the devisee accepts the devise, he becomes personally liable for the legacy, and must pay it whether the property devised be of less or greater value.
24. A devise of "all my property real and personal of every description," except certain specified portions, "unto my wife during her natural life," is a general and not a specific bequest. *Mayo vs. Bland*, 484.
25. A devise of "my Bland Air estate, with all the slaves and their increase, which I derived in a course of distribution from my uncle, T. F., deceased, and all the personal property thereon, not slaves, and used with

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the same at the time of my death unto my daughter during her natural life," is a specific bequest. *Ib.*

26. A bequest of "all my books, historical or biographical, of Greece, of Rome, of Great Britain or Ireland, of the United States, and of the several states, and Rees' Encyclopedia to my son-in-law as a token of my respect for him," is a specific legacy. *Ib.*
27. A bequest of "all the rest of my books with my household furniture, to be preserved by my wife for her own use during her life, as hereinbefore mentioned, or to be sold or given to our children or grandchildren in such manner and proportions as she may think proper," is a general legacy. *Ib.*
28. To constitute a bequest of personal estate specific, there must be a segregation of the particular property bequeathed from the mass of the estate, and a specific gift of the separated portion to the legatee. *Ib.*
29. The devise of "my Bland Air estate, and all the slaves and personal property thereon, not slaves, and used with the same," passes the crops and produce on the farm at the time of the testator's death, and also the furniture in the dwelling house standing upon the farm, and used by those occupying it. *Ib.*

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